IN THE
SUPREME COURT OF MISSOURI

BRIAN J. DORSEY,	)	
	)	
Appellant,	)	
	)	
vs.	)	**No. SC 93168**
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI
THIRTEENTH JUDICIAL CIRCUIT, DIVISION 1
THE HONORABLE CHRISTINE CARPENTER, JUDGE

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

Brian Dorsey appeals the denial of his motion under Rules 24.035 and 29.15 by the Honorable Christine Carpenter, Judge of the Circuit Court of Boone County, Missouri. Brian had sought to vacate his conviction of first-degree murder, § 565.020,[1] and the resultant sentence of death imposed by the Honorable Gene Hamilton. On December 31, 2012, the court denied relief on Brian's motion(PCR.L.F.194),[2] and notice of appeal was timely filed February 11, 2013(PCR.L.F.196). Because a death sentence was imposed, this appeal involves an issue reserved for this Court's exclusive appellate jurisdiction. Art.V,§3,Mo.Const.

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[1] All statutory citations are to RSMo 2000, unless otherwise noted.

[2] The record on Appeal consists of a post-conviction legal file(PCR.L.F.), and an evidentiary hearing transcript(Hr.Tr.). Brian also asks this Court to take judicial notice of its complete file in the direct appeal, *State v. Dorsey*,No.SC89833. The trial transcript and legal file are referred to as(Tr.) and (L.F.) respectively. Exhibits will be referred to as St.Ex.(State's), D.Ex.(Defendant's), and M.Ex.(Movant's).

STATEMENT OF FACTS

TRIAL

Sarah Bonnie and Brian Dorsey were cousins; Sarah's father Mike Mosier is the brother of Brian's mother Patty Dorsey(Tr.532,538). On December 23, 2006, Pam Brauner, a cousin of Patty and Mike, spoke to Brian on the phone(Tr.974-75). Brian told Pam he owed money and had no way to repay it so he needed to borrow it(Tr.975-76). Pam knew Brian was in trouble because he wouldn't normally have asked her for money(Tr.976). She also knew Brian wanted the money for drugs and told him she didn't have any money to spare(Tr.976). Pam was concerned because of Brian's two prior suicide attempts and called Brian's mother, Patty, who lived in Warsaw, Missouri(Tr.976-77). Brian had also called his mother asking her for money to repay his drug debt(Tr.862,895). Patty told Brian she would be in Jefferson City, where Brian lived, the next day(Tr.862).

Traci Sheley, Sarah's older sister and also Brian's cousin, was at home around 5:00p.m. on December 23, 2006, when she also received a phone call from Brian; he sounded a "little different, maybe a little shaky."(Tr.577-78). Brian asked to borrow money and Traci told him she didn't have it(Tr.579). Traci called her older sister Krista and her younger sister Sarah, and told them Brian needed money for drugs(Tr.579). Sarah told Traci that she and her husband Ben were going to Brian's apartment because drug dealers wouldn't let him out until they were paid(Tr.580,896).

Traci and Darin Carel, another friend of Sarah and Ben's, met Sarah at Brian's apartment(Tr.580,596-97,889). When they entered, Brian appeared to have been

crying(Tr.590-92). A black man and a white woman, Brian's drug dealer, left the apartment(Tr.581,597). Brian went to Ben and Sarah's house with them, while Darin and Traci followed(Tr.582,597). Traci picked up her husband, Jon, and three of her children to join the group for the evening(Tr.582).

At the house, the men congregated in Ben's shop – out in a shed or barn – where they played pool and drank beer(Tr.566-67,592,599,890). Sarah's four-year-old daughter, Jade, was going to spend the night with Sarah's mother, Diana, but when Jade heard that Brian was there, she told her grandmother that she wanted to see him so Diana took Jade home(Tr.540,545,567). Diana remained for a while, visiting; when Diana left, Traci and her family had already gone home, leaving Sarah, Ben, Jade, Brian and Darin(Tr.542). When Traci left, everyone was in the house, except Brian and Darin, who were still in the shop(Tr.586). Sarah tried to get Darin to spend the night but he went home(Tr.601).

About 1:00 a.m. on December 24, Brian went to see Patricia Cannella, from whom he borrowed money to buy drugs, with some items he wanted to use to repay the debt(Tr.604-05,886-88). Brian was driving a white car, which he said was his, in which was the property he was trying to sell, including electronic equipment, guns, jewelry, and cell phones(Tr.607-09). That night Brian drove around, trying to sell the property to people in the streets(Tr.607). Brian was heavily intoxicated and had a bottle of vodka with him(Tr.611).

On December 24, Ben and Sarah didn't arrive at the house of Ben's parents, Gregg and Marilyn, for a family get-together(Tr.533,543,803,812). Amber Bonnie, Ben's

brother's wife, called Mike and Diane Mosier and asked that they go check, since they had gotten no response to repeated phone calls(Tr.533,543,803,812). The Mosiers drove to Ben and Sarah's and, when they entered, found Jade sitting in the living room watching television(Tr.535). Mike jimmied the lock on the master bedroom door and found Ben and Sarah dead(Tr.535-36). Each had died from a single shotgun wound to the head, causing immediate death(Tr.716-21).

Areas of the master bedroom were in disarray(Tr.668). The room had a strong odor of bleach, and Detective Nichols concluded bleach had been poured over parts of Sarah's body, including her mid-section(Tr.672-76). He saw "pour marks" through the blood on her side(Tr.679). Sarah wore only a t-shirt, and, according to the State's DNA analyst, results from a vaginal swab revealed that Ben Bonnie and Darin Carel could be eliminated as the source of Y-chromosome DNA, but Brian could not; he assumed the DNA was from sperm which were on the swab(Tr.679,841-49).

On December 24, Patty and Larry Dorsey drove to Jefferson City in preparation for a family get-together(Tr.858). They stopped by Brian's apartment, but he wasn't home(Tr.858). They received a call from Patty's cousin Linda, who told them that Ben and Sarah had been shot, and they immediately drove to Ben and Sarah's house(Tr.859-60). Mike, Patty's brother, told them that Brian had been at the house the night before and the police were looking for him(Tr.860).

Patty and Larry returned to Brian's apartment but he was not there(Tr.863). The next day, they unsuccessfully continued to try to reach him by phone(Tr.863). They were sad and concerned about Ben and Sarah's deaths and because – since Brian had

made two prior suicide attempts – they believed he had tried again and was successful(Tr.864,874).

Around 11 p.m. on December 25th, Brian called and told Patty he wanted to talk to her one last time since he was preparing to commit suicide(Tr.874). He hung up but called her back as she had asked and agreed that they could come get him so he could turn himself in(Tr.875). They picked Brian up across the river from the capitol and went to the sheriff the next morning, where Brian acknowledged that he was the person they needed to talk to about Ben and Sarah's deaths(Tr.27,36,44,875,900).

Brian testified that he had been awake and smoking crack cocaine for two to three days and, when it ran out and he had no money for more, he began calling family asking for money(Tr.886-87,894). When Ben and Sarah came to free him from the drug dealers, Brian went with them, buying beer on the way(Tr.889). That night, as he, Ben, Jon, and Darin played pool, Brian continued to drink beer(Tr.890,897). Later that evening, he got a bottle of vodka from the kitchen and drank it(Tr.951). Although Brian testified that he didn't recall everything that occurred, as he tried to sell the property later that night, he realized it wasn't his(Tr.898-99).

In Sarah's car, which officers had found parked in the river bottoms, officers found property belonging to Sarah and Ben, including a 20-gauge shotgun(Tr.550-51,560,587-89,736,742-50). Cannella identified much of it as what Brian had attempted to sell in the early morning on December 24(Tr.607-09).

Brian pleaded guilty to two counts of first-degree murder, admitting killing Sarah and Ben; a jury trial was held as to punishment(Tr.88-100). The jury assessed the

punishment at death on both counts, finding all three statutory aggravators that had been pled for Count I(Ben) and all four that had been pled for Count II(Sarah) (L.F.176-79;Tr.1042-43). The trial court sentenced Brian to death(Tr.1054,1058-59). This Court affirmed on direct appeal.*State v.Dorsey*,No.SC89833.

POST-CONVICTION

Brian filed a *pro se* post-conviction motion on November 24, 2010, and the court conducted an evidentiary hearing on December 7-9, 2011(PCR.L.F.3-4,6).

DNA.

The jury that imposed death sentences for Brian did not hear that Jason Wyckoff, Missouri State Highway Patrol lab DNA analyst, had deleted information before sending his report to the prosecutor – his data from which he developed the full autosomal profile from the two vaginal swabs taken from Sarah showed peaks at two particular loci, but Wyckoff decided they did not measure up to his standards to include in his report(Hr.Tr.376-78,381-85;Wyckoff Depo.29-35).[3] Wyckoff had testified at trial that when he performed "routine" DNA testing on the swabs, he did not find another person's DNA present besides Sarah's(Tr.841-42).

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[3] Wyckoff's pretrial deposition was admitted as State's Ex.1(Hr.Tr.728). By agreement, in lieu of Wyckoff's testimony, the State submitted a post-hearing deposition, referred to as Wyckoff.Depo, though it was never offered and has no exhibit number(Hr.Tr.759-60,766).

Post-conviction counsel retained Dr. Dean Stetler, professor of Molecular Biosciences at the University of Kansas, to review the DNA evidence(Hr.Tr.341-42,345). Along with the material received by trial counsel in discovery, post-conviction counsel obtained and provided to Dr.Stetler the electronic data from the MSHP lab(Tr.345-46).

A full "autosomal" DNA profile consists of 15 different loci with presumably two alleles at each locus(Hr.Tr.356-57). A full profile is essentially an absolute identification of an individual(Hr.Tr.357). A Y-chromosome profile, particular to males, consists of different, and fewer, loci that are specific only to the Y chromosome(Hr.Tr.361-62). The Y-profile Wyckoff developed from the swab was consistent with Brian's profile and inconsistent with Ben's and Darin's(Tr.845-47;Hr.Tr.363). As Dr.Stetler explained, the Y-profile is shared throughout the male line, including all males on one's father's side of the family, not just ancestors – it would not matter if it was a 20th cousin or a relative from 200 years before, and unrelated males can share a Y-profile – which is why the Y-profile is less discriminating than a full autosomal profile(Hr.Tr.392-94). The donor of the Y-profile did not necessarily have sexual intercourse with Sarah, because the Y-profile may not have come from sperm(Hr.Tr.395-96).

When Dr.Stetler reviewed the electronic data from the MSHP lab – data that trial counsel did not request or receive – he discovered the deletion of peaks on the full profile from the vaginal swab(Hr.Tr.376-78,381-85;Wyckoff Depo,pp.34-35). A DNA profile is displayed in a graph called an electropherogram that looks like an

EKG readout with peaks and valleys; the heights of the peaks are measured in relative fluorescence units("RFU")(Hr.Tr.377-78). The material Dr.Stetler received before receiving the electronic data was incomplete because it did not include the peak heights(Hr.Tr.378).

Dr.Stetler explained that when analyzing an electropherogram, there are standards for whether a peak depicts an allele, which is part of the DNA profile, and what may be ignored as "stutter," not a true allele(Hr.Tr.378,387). The FBI protocol for peak heights is 200RFU for inclusion purposes, but 50RFU or higher can be used to exclude a person as a possible donor to a sample(Hr.Tr.378). Dr.Stetler said the MSHP lab also uses a 50-RFU cut-off; he was familiar with their standards from reviewing casefiles(Hr.Tr.379). The electropherogram for the autosomal profile from the vaginal swab that was disclosed to trial counsel showed peaks for alleles 10 and 12 at the CSF locus which were consistent with Sarah's profile(Hr.Tr.381-82). It did not show any other peaks, though it did have what Dr.Stetler referred to as a "shoulder" between the 10 and 12 peaks, but because the disclosed electropherogram was not detailed, and it apparently was not designated as an allele by the computer, Dr.Stetler assumed it was too small for the computer to count(Hr.Tr.379-82).

When Dr.Stetler obtained the electronic data, it revealed that the shoulder was a peak; in fact, it was an 11 allele at that CSF locus with an 84 RFU height(Hr.Tr.384-85). The computer had classified it as an allele, but that information was not on the materials sent to the defense in discovery(Hr.Tr.385-86). The 84 RFU peak height

was above the FBI and MSHP lab cut-off for exclusion of 50 RFU(Hr.Tr.386). An 11 allele at that locus could not have been contributed by Sarah or Brian(Hr.Tr.386-87).

A factor used in determining whether a particular peak is a true allele, not stutter, is that its height must be no less than 9.2% of the adjacent allele(Hr.Tr.387-88). In this case, the next allele was at 12, which had a peak height of 840, meaning that the peak at 11, at 84 RFU, was within the protocol and should be considered an allele – meaning there was a donor other than Sarah and Brian(Hr.Tr.388-89).

That Brian could not have been the donor of the 11 allele was not affected by the Y-profile result; thus if there was only one donor besides Sarah to the sample, that donor could not have been Brian(Hr.Tr.395). Ben's profile showed an 11 allele at that locus, so he was a possible contributor, but neither Wyckoff's report nor his testimony mentioned this(Hr.Tr.390). Dr.Stetler became aware of the allele only by reviewing the electronic data – the "shoulder" he noted on the report disclosed to trial counsel did not have enough detail to alert him to the peak height or that the computer had classified it as an allele(Hr.Tr.385,390-91). In Dr.Stetler's experience, the MSHP lab included the peak height data in their printed reports; not just in the electronic data(Hr.Tr.391).

When deposed, Wyckoff testified that the peak at 11 in his electronic data and referred to by Dr.Stetler was an artifact – a stutter – not an allele, which occurred during the analysis process(Wyckoff.Depo.13-15). Wyckoff said the lab uses 50 RFU as a minimum for the computer to detect a peak, but there are other factors that are involved in deciding whether it is an allele, including a relative peak height of no less

than 15% of the adjacent peak; and looking at the entire profile to determine whether there are peaks in other locations that are not characteristic of stutter, which would lead him to believe that he was dealing with a mixture(Wyckoff.Depo.17-19). The resolution of these factors is left to the analyst's discretion(Wyckoff.Depo.33-34).

Wyckoff said the peak at 11 was stutter because there were alleles at 10 and 12, and the 11 peak at 84 RFU was only 10% of the 840 RFU of the allele at 12(Wyckoff.Depo.17-19). The 15% factor in determining an artifact was based on studies by the MSHP lab(Wyckoff.Depo.34). He later said it was, "Generally 15 percent at analyst discretion."(Wyckoff.Depo.40). He agreed whether something is stutter is discretionary from lab to lab and analyst to analyst(Wyckoff.Depo.44-45). Wyckoff is not aware of any studies showing the percentage for peak height variation at the CSF locus is 10% or less(Wyckoff.Depo.44). But he agreed that a peak at 10% of the height of the adjacent allele might be called an allele, based upon the entire profile(Wyckoff.Depo.47).

Wyckoff also removed a peak at 23 at the FGA locus, with a peak height of 107RFU, which was 14.2% of the adjacent allele(Wyckoff.Depo.47-49). According to Wyckoff, that was also not an allele(Wyckoff.Depo.47). Part of his reason was that there was no mixture at any other locations(Wyckoff.Depo.49-50). The 23 peak Wyckoff struck was also an allele in Ben's profile(M.Ex.JJ,NN).

Wyckoff testified his removal of the stutter was disclosed in his original report; Ex.II-1 attached to the deposition[4] states, "removed stutter 10% at CSF and 14% at FGA[.]"(Wyckoff.Depo.22-23). The report does not note the number of the peak/allele(Ex.II-1). Wyckoff agreed his original report did not include peak heights, but that is in the electronic discovery, which counsel could have had they asked(Wyckoff.Depo.83-86). His records show no request(Wyckoff.Depo.85).

Wyckoff said he removes stutter for simplicity– so it does not interfere with reviewing the allele designations(Wyckoff.Depo.35). He agreed that he would be the one reviewing the data; no one else reviewing the electropherogram would know he removed a peak without having his data(Wyckoff.Depo.35).

Wyckoff knew there had to be two people represented in the DNA from the vaginal swab, but he did "not want this profile from [Depo.Ex.]NN-3 to be determined as a mix sample because it appears to me to be single source."(Wyckoff Depo.75).[5] Wyckoff's results do not preclude the possibility that the donors of the Y-profile and the sperm cells were different people(Wyckoff.Depo.77).

Although the swab screened positive for semen, Wyckoff could not confirm its presence: he could not detect a protein found in high concentrations in semen(Tr.839).

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[4] Exhibit II-1 is a page from M.Ex. II admitted at the evidentiary hearing, which was a copy of the discovery supplied to trial counsel(Hr.Tr.346-47).

[5] NN-3 is the electronic electropherogram from the vaginal swab with the CSF and FGA peaks highlighted(App.A-59).

The MSHP lab has done its own studies and determined that certain chemical "insults," such as detergents, could prevent detection of the protein(Tr.840-41). Because there were intact sperm cells on a slide made from the swab, Wyckoff ran a second test, targeting only the Y chromosome – he assumed he was testing the sperm cells, but he could not tell for sure(Tr.842-45).

When a sample being analyzed contains sperm, as in the case of the vaginal swabs in this case, it is possible to do a "differential" extraction, in which the DNA from the sperm can be removed separately(Hr.Tr.366-67). But if, as was done in this case, a standard extraction is done without separating the sperm, then it is not possible to tell whether the origin of the DNA is the sperm or some other cell in the sample(Hr.Tr.365,368). Dr.Stetler explained that one should do a differential extraction when analyzing a vaginal sample, because otherwise it is not possible to go back and do so later to develop a full DNA profile specifically from the sperm(Hr.Tr.369-70). But had Wyckoff done a differential extraction in the beginning, he could have done both the full and Y-profiles without using up the material(Hr.Tr.370). Wyckoff found intact sperm on a slide prepared from the vaginal swab before doing the extraction but did not do a differential extraction(Hr.Tr.371-73).

Wyckoff said he did a standard DNA extraction after the protein test did not show semen in the vaginal swab because that meant there was no reason to believe sperm would be present, even though he was given information about possible sexual activity; he intended to test for possible penile epithelial cells(Wyckoff.Depo.66-67).

Once he noted intact sperm on the slide, it was not ideal to go back and do a differential extraction because the sperm had been sitting in water for at least a day, so the DNA may no longer have been there(Wyckoff.Depo.68).

The Y-chromosome DNA test eliminated Ben Bonnie and Darin Carel as the source of the profile from the swab(Tr.845-46). It did not eliminate Brian, but because the Y chromosome is passed from father to son, it is shared within the male lineage; there are also unrelated people who share a Y-profile(Tr.843-47). This results in this profile being expected to occur on average in 2.3 cases per 1000 individuals in the Caucasian population(Tr.848). The prosecutor asked Wyckoff about a second "hit" on the profile, on a man named John Sim,[6] whose DNA was coded when he entered the Department of Corrections(Tr.848-49). The prosecutor continued:

> Q. And Mr. Sims was, at that time and at the relevant times in this case, in prison, was he not?
>
> A. I don't have that information.
>
> Q. But that's where that was developed from, if Mr. Sims was – the Sims sample was coded when he entered the Department of Corrections; correct? Isn't that the database it came from?
>
> A. Yes.

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[6] Although Sim's name was stated as "Sims" in the trial transcript, it was learned in the course of the post-conviction case that his name is Sim(Ex.RR).

(Tr.849). Brian presented evidence in the post-conviction case that Sim was not in custody then; he had been released in August 2005 and went back in July 2007(M.Ex.RR;Hr.Tr.465).

Trial counsel Scott McBride primarily dealt with the DNA evidence(Hr.Tr.671-72). He received materials from the State at the end of February 2008(Hr.Tr.672-73). The Public Defender System approved $1,500 for a DNA expert – to determine the admissibility of Y-profile evidence – but McBride did not contract with a lab or otherwise spend the available funds(Hr.Tr.674-78). The company that counsel contacted indicated they would have to have the electronic data before giving an opinion(Hr.Tr.678-79;M.Ex.OO). McBride's investigation of the DNA evidence consisted of reviewing the discovery and deposing Wyckoff(Hr.Tr.677). He did not recall whether he reviewed the discovery before Brian pleaded guilty(Hr.Tr.676-77).

McBride recalled that two aggravators pled by the State were the rape, and that the murder was particularly heinous because of the rape(Hr.Tr.680). His investigation of those matters was primarily reviewing the lab material provided by the State(Hr.Tr.680). When Brian decided to plead guilty, the focus of the case became an appeal for mercy, but McBride would have wanted to know the information in the electronic discovery before making a decision about whether to challenge the rape aggravator(Hr.Tr.689-90).

Brian Hoey is the laboratory manager and DNA technical leader at the MSHP lab(Hr.Tr.411-12). In 2007 and 2008 he was the supervisor of the DNA section(Hr.Tr.412-13). He said the peak height standard is 50RFU and has been for

years(Hr.Tr.413-14). Hoey agreed that the 84RFU peak at 11 on the CSF locus was probably stutter; he said it was not even a peak(Hr.Tr.440-41). He said the only time a stutter would be a peak is where there is a DNA mixture – it would be irresponsible to call something a stutter if they had any indication that there was another DNA profile masked in a larger profile(Hr.Tr.441). Wyckoff testified in his pretrial deposition that one reason he ran the Y-profile was that the routine autosomal profile he developed had "so much female DNA that it masked any male DNA[.]"(Ex.1.40).

Hoey testified that generally, a peak height of at least 15% of the adjacent peak is necessary to avoid classification as stutter, then said the percentage is difference for each locus(Hr.Tr.442-43,446). He did not know the percentage for the CSF locus, but agreed it was possible that it was as low as 9.2%, in which case the 10% here would be above the threshold(Hr.Tr.449-50). Hoey also agreed that the parameters programmed into the lab's computer listed the 11 at CSF as an allele(Hr.Tr.447). He could not say from a single allele at a single locus whether the profile was a mixture, though it was a tough question(Hr.Tr.452). His assessment of the peak at 11 as a stutter was based only on what he was shown in court, not the complete case file, which he had not reviewed, but he felt his assessment would not change(Hr.Tr.463).

Hoey notified the Callaway prosecutor about the CODIS hit on Sim in May 2008(Hr.Tr.414-15). The lab originally notified prosecutors of every hit, but over time they found that they were getting "countless" numbers of hits, meaning the Y-profiles were not of much value, so they phased out automatic searches(Hr.Tr.428-33,459-60). Before they did so, on August 20, 2008 – six days before trial started –

the lab generated another hit on the Y-profile, to Timothy Kathcart(Hr.Tr.427). There were additional hits on October 29, 2008, June 11, 2009, and August 12, 2009, to Brandon Brown, Jeremy Morgan, and Charles Forbes(Hr.Tr.427-28). Hoey admitted the information was probably available to him in August 2008, but he had no reason to look for it(Hr.Tr.431-32).

McBride would have wanted to know about the additional CODIS hits before trial; if nothing else, he would have followed up with Wyckoff(Hr.Tr.692-94). He did not do any investigation after the hit on Sim was disclosed(Hr.Tr.697). He did not object when the prosecutor implied though his questions to Wyckoff that Sim was in custody at the time of the murders; he was under the impression that Sim was in custody but did not recall where that impression came from(Hr.Tr.699). When asked why he did not object, McBride answered that he thought their argument was better the less time they spent talking about the evidence of rape(Hr.Tr.699). He did not know it was false or misleading information at the time(Hr.Tr.699-700).

Medical treatment for depression and suicide attempts.

Brian was treated for depression by his family doctor and a psychiatrist beginning in 2003(Hr.Tr.121,139). Family practitioner Dr. Gerald Moline has received training in diagnosing and treating mental health problems, and as a physician can prescribe psychotropic medications(Hr.Tr.118-19). In October 2003 Brian sought treatment, complaining of depression and insomnia(Hr.Tr.120-21). Dr.Moline started Brian on Zoloft for anxiety and depression, and Ambien for sleep(Hr.Tr.123). Brian returned

after running out of medication, saying they were not working well, and Dr.Moline switched him to the more powerful Effexor, adding Klonopin for anxiety(Hr.Tr.124-25). Dr.Moline treated Brian until early 2005(Hr.Tr.129). He did not see such severe symptoms as to feel the need to refer Brian to a psychiatrist(Hr.Tr.131). He was not contacted by trial counsel, but he would have testified if called(Hr.Tr.128,133).

John Lyskowski, board-certified in psychiatry, now works for the Missouri Department of Mental Health(Hr.Tr.136-37). Brian became Dr.Lyskowski's patient in December 2005, when he was admitted to the hospital with very specific suicidal thoughts of hanging or cutting himself(Hr.Tr.138-39,144). Dr.Lyskowski diagnosed Brian with major depression, put him on double antidepressants, and admitted him to the hospital's psychiatric ward, placing him on suicide watch(Hr.Tr.140,147-48).

Brian left the hospital after six days; he was readmitted four days later after cutting his wrist, nicking an artery(Hr.Tr.149,162). Dr.Lyskowski said the need for suturing made the suicide attempt serious(Hr.Tr.150). It became clear to Dr.Lyskowski by the second admission that Brian was abusing cocaine heavily(Hr.Tr.155). People with anxiety, like Brian, who use cocaine would have worsening anxiety, and in the long term can get paranoid and delusional(Hr.Tr.155).

Mitigation/diminished capacity evidence.

Trial counsel did not inform the jury that Brian's mother had also been treated for depression, that his extended family had a history of alcohol abuse, or that Brian's parents had observed behaviors in his childhood that were indicative of

depression(Hr.Tr.68-70). Dr. Robert Smith, a clinical psychologist and addiction specialist retained by trial counsel, was not asked before Brian's guilty plea to evaluate him for a diminished capacity defense(Hr.Tr.44). Nor did trial counsel retain a psychiatrist in representing Brian(Hr.Tr.591-92).

Dr.Smith interviewed Brian twice before the penalty phase trial – in August 2007 and March 2008(Hr.Tr.21,23,26). He administered three drug and alcohol screening tests at the first meeting(Tr.938;Hr.Tr.23-24). Dr.Smith had not reviewed any records beforehand and they did not speak about Brian's thoughts before and at the time of the murders, or Brian's substance abuse history(Hr.Tr.23-25). Dr.Smith did not receive Brian's records from trial counsel until February 2008, and he did not meet Brian for the second time until after the plea(Hr.Tr.25-27). Before the second meeting, Dr.Smith reviewed Brian's educational and medical records, and the police reports, which confirmed what Brian told him about his history; Dr.Smith found, based on the interviews, test results, and record review, that Brian has suffered from alcohol and drug addiction, along with Major Depression, his entire adult life(Tr.939-45;Hr.Tr.29-32).

Dr.Smith explained that though he told counsel it would be very important to interview Brian's parents, that did not happen before trial, nor did he receive Brian's records until after Brian had pleaded guilty(Hr.Tr.26-27,44,47-48). Dr.Smith did not know before trial about Brian's mother's medication for depression, or the extent of Brian's father's alcohol abuse and its resulting contribution to the family's dysfunction(Hr.Tr.49-50).

Dr.Smith learned from Brian's mother, Patty, that she had a history of depression for which she had taken medication(Hr.Tr.50). Brian had not known that, so Dr.Smith could not testify about it at trial or take its significance into account in forming his opinions about Brian(Hr.Tr.50). Patty also had aunts and uncles who abused alcohol, which was important information because of the genetic component in susceptibility to addiction(Hr.Tr.51). Most people who develop addictions to alcohol and/or drugs do so due to genetic influences that put them at risk(Hr.Tr.51). Addiction is a physiological response to substances, not a choice(Hr.Tr.51).

The most important information Dr.Smith received from Patty concerned Brian's mental health and substance abuse history: she had noted signs of depression early in his adolescence – by age 13 or 14, Brian had become isolated and withdrawn, with a flat affect(Hr.Tr.51-52). These clear signs of the beginnings of a depressive disorder were not in the records Dr.Smith received – the diagnosis of depression they contained was from when Brian was an adult(Hr.Tr.52). Noting the early onset of depression gives a better understanding of Brian and the progression of his symptoms, which predate his use of alcohol and drugs; indicating he was self-medicating his depression with those substances(Hr.Tr.52). Brian did not tell Dr.Smith he was depressed as a child, which is not surprising because most children don't think of themselves as depressed(Hr.Tr.54).

Brian's father, Larry, was open about his own alcohol use – 12 or more beers almost every day – and a family history of substance abuse that supported Brian's diagnoses(Hr.Tr.55). Larry's brother and a family friend confirmed alcohol was an

ongoing problem for Larry, and that it caused problems in his relationship with Patty(Hr.Tr.56-57). Brian was exposed to alcohol abuse and family conflict throughout childhood(Hr.Tr.57).

The importance of the information from Brian's parents, uncle, and family friend that Dr.Smith did not have before trial was twofold: it provided support for the genetic influences underlying Brian's addiction – a family history of alcoholism on both sides of the family; and Brian's mother's history of depression and medication showed that Brian also had a genetic predisposition for that disorder(Hr.Tr.57-58).

Dr.Smith believed Brian was under an extreme mental or emotional disturbance at the time of the murders, due to his major depressive disorder and alcohol and cocaine dependency(Hr.Tr.59). As he had at trial, he opined that Brian's capacity to conform his conduct to the law was impaired(Hr.Tr.59). Had he been given the opportunity to interview Brian's family and family friend before trial, he would have, and his testimony would have been the same at trial as it was at the post-conviction hearing, if he had had that information(Hr.Tr.59-60).

Trial counsel did not retain a psychiatrist to evaluate Brian before he pleaded guilty(Hr.Tr.591-92). Mr. Slusher may have spoken to a psychiatrist, but he could not recall for sure(Hr.Tr.591-92). Slusher did not believe that he considered bringing in a psychiatrist to examine Brian(Hr.Tr.592).

Dr. A.E.Daniel, board certified in forensic psychiatry, evaluated Brian in the post-conviction case(Hr.Tr.220-21,225). Dr.Daniel has served as the director of the privatized psychiatric services for the State of Missouri(Hr.Tr.224-25). He reviewed

Brian's medical, psychological, and substance abuse treatment records, including his suicide attempts, his school and DOC records, the criminal investigation and trial records, and a social history prepared by post-conviction counsel's office(Hr.Tr.226-39). Dr.Daniel interviewed Brian on three occasions for two to three hours each time, and he interviewed Brian's parents(Hr.Tr.243-44). Dr.Daniel saw little nurturing and emotional support from either parent(Hr.Tr.251).

Brian's grandparents had a history of alcoholism, and there is a significant correlation between such family history and a high risk for alcohol dependence in subsequent generations(Hr.Tr.252). Brian began using alcohol and drugs in his teens and became addicted to crack cocaine – a heavily addictive substance, causing both psychological and physical dependence(Hr.Tr.256-57,280). The "high" from crack is short and its users develop a tolerance, so they seek more and more or suffer withdrawal(Hr.Tr.258,281).

Brian was diagnosed with depression before the murders, dating back to 1995; he was admitted to psychiatric facilities three times, including twice due to suicide attempts(Hr.Tr.259). It was evident Brian suffered from chronic major clinical depression(Hr.Tr.259). Although Brian was given prescription antidepressants, their efficacy is substantially lowered when one continues to use drugs(Hr.Tr.264). With Brian's dual diagnosis of major depression and chemical dependence, the two conditions fed into each other(Hr.Tr.282). And coming down from a cocaine high is itself depressing, which leads to a vicious cycle of self-medicating with the drug(Hr.Tr.282-83).

Brian told Dr.Daniel that on December 23, 2006, he was with a woman named Patty who "fronted" him crack cocaine; when she returned for payment, Brian called some family members, including his cousin Sarah(Hr.Tr.290-91). Sarah and her husband Ben went to Brian's apartment and got him out of the situation, taking him to their rural house, picking up beer along the way(Hr.Tr.292). Brian drank seven to ten beers at the Bonnie home as they played pool in an outbuilding, and his memory is spotty for the events of that time(Hr.Tr.293-94).

Eventually, sometime late that evening, only Sarah, Ben, their daughter Jade, and Brian remained(Hr.Tr.294). Ben went to bed, heavily intoxicated(Hr.Tr.295). Brian remembered speaking to Jade, and to Sarah briefly before she went to bed(Hr.Tr.295). Brian planned to spend the night in the outbuilding, but at some point he went in the house looking for alcohol(Hr.Tr.295-96). He found a bottle of vodka and drank a large part of it(Hr.Tr.296). He went back to the outbuilding, feeling suicidal, and found a shotgun and ammunition(Hr.Tr.296-97).

Brian remembered being in the room with Sarah and Ben, but did not remember shooting(Hr.Tr.297). It is not uncommon to find "patchy" memories in those chronically drug or alcohol dependent with major depression(Hr.Tr.324). When Dr.Daniel was asked about Brian's telling Dr.Smith that he remembered shooting Ben and Sarah, he explained that Brian's statement only seemed inconsistent: It was the statement of a person who did not then have the capacity to formulate the necessary intent, but he felt extreme remorse for having committed the act, and his statement may not have been entirely consistent with what actually happened(Hr.Tr.328-31).

Brian was in a very depressed, guilt-ridden state in 2007 when he spoke to Dr.Smith, and his statement to Smith probably reflected his mental state at that time(Hr.Tr.331).

In speaking to Dr.Daniel, Brian remembered that Jade woke up crying and wanting to go to her mother's room, and that he told her she could not, encouraging her to go back to sleep(Hr.Tr.297). He had no recollection of having any physical contact with Sarah(Hr.Tr.297-98). He also did not remember taking any property from the house, though he remembered being in possession of it later(Hr.Tr.298). Brian had a vague memory of seeing his cocaine supplier(Hr.Tr.298). He slept through most of December 24th; he remembered then going to the river bottoms, where he called his mother(Hr.Tr.298-99).

Brian denied to Dr.Daniel ever having a sexual attraction to Sarah(Hr.Tr.300). Dr.Daniel found that Brian did not have any deviant sexual interest and did not meet the criteria for any sexual deviation disorder(Hr.Tr.308). He based his opinion on several factors: Brian had never been sexually abused; there were no credible reports of allegations of sexual misconduct; there was no evidence of sexual misconduct in his relationships with women; and Dr.Daniel's own evaluation showed no sexually deviant interests(Hr.Tr.307-08).

Dr.Daniel confirmed the diagnoses others had made: major depressive disorder, recurrent type, chronic, severe; and polysubstance dependence, particularly cocaine and alcohol(Hr.Tr.308-09). He believed that at the time of the murders, Brian was severely psychiatrically impaired due to the combined impact of those two

conditions(Hr.Tr.309). As a result, Brian was not able to coolly reflect upon his conduct(Hr.Tr.309).

Dr.Daniel also testified that Brian's ability to appreciate the wrongfulness of his conduct was severely compromised or impaired, and he was laboring under an extreme emotional and mental disturbance(Hr.Tr.309-10). Brian was going through cocaine withdrawal at the time, which he dealt with by self-medicating, heavily drinking alcohol(Hr.Tr.319-21). The fact that Brian had to reload the shotgun did not mean he had the ability to reflect on the consequences of his actions, which is not the same as saying he did not understand what would happen(Hr.Tr.325).

The mental health issues and evidence were primarily the responsibility of trial counsel Chris Slusher(Hr.Tr.574-75,700-02,708). Slusher did not recall seriously considering a diminished capacity defense(Hr.Tr.591). Both counsels' strategy in advising Brian to plead guilty was to hope for "credit" from the jury for his accepting responsibility(Hr.Tr.581,709-10). Slusher did not recall specifically discussing diminished capacity with Dr.Smith; he expected Smith would do the kind of evaluation he had done in the past for Slusher, assuming it would include diminished capacity, since that could be a mitigating factor, even if not raised as a defense to first-degree murder(Hr.Tr.591,594). Slusher did not usually give mental health experts specific instructions along those lines; he would simply describe the circumstances and ask for a "workup"(Hr.Tr.594-95).

When asked why he would not ask an expert to test whether Brian fit within the parameters of diminished capacity, extreme emotional disturbance, or an inability to

conform his conduct to the law, Slusher said his process was that he would get the doctor's report and have discussions about how the findings fit into various legal theories(Hr.Tr.595-96). He did not recall specific discussion with Dr.Smith about the extreme mental or emotional disturbance mitigator, but in general, he is concerned about raising that issue, particularly if there is voluntary drug use, because he feels juries do not care that a mental health expert explains the connection between the drug use and the murder(Hr.Tr.596-97). Although he did not recall, it would not surprise him that he chose not to seek that mitigator, "because we already have one and we have what we need to argue."(Hr.Tr.597).

Slusher did not believe he could achieve a verdict of life just on evidence of depression(Hr.Tr.598). He did not recall thinking about whether depression was recognized as a mental disease or defect, and he did not consult a psychiatrist to determine whether the medical profession considered it to be one(Hr.Tr.598-99).

Evidence that Brian tried to cover up a rape.

Detective Nichols saw what he believed was a "pour" pattern where a liquid had been poured on Sarah's groin or genital area(Tr.676,686). His theory was that bleach had been poured on her, based on the smell of bleach in the bedroom, especially on the side of the bed where Sarah's body lay, the bleached-out appearance of a portion of the bedroom rug, and the presence of a bottle of bleach in the bathroom adjacent to the bedroom(Tr.673-76). He cut out a piece of the carpet to test, but never heard back from the lab(Tr.673-74)(it did not test the carpet;Hr.Tr.634). Using an alternative

light source, Nichols photographed, at the scene and at the autopsy, the portion of Sarah's body where he believed he saw pour marks(Tr.676,679,686; St.Ex.33,34).

Post-conviction counsel retained Joseph Johnson, an assistant professor who teaches photography at the University of Missouri, to review the alternative-light photography(Hr.Tr.164-69). Professor Johnson reviewed St.Ex.33 and 34, autopsy photographs of Sarah, which were also admitted at the hearing as M.Ex.T and U(Hr.Tr.169-70). Certain substances can be made to fluoresce using other than standard lighting and/or filters or media – whether film or digital media – that is sensitive to light at other wavelengths than the visible spectrum(Hr.Tr.169-70).

Johnson was asked to determine whether he could duplicate the look of the marks on Sarah's body(Hr.Tr.170-71). He obtained information from Nichols through post-conviction counsel concerning the model of light and the conditions under which it was used; he obtained from the manufacturer a similar light and information as to what equipment to use to make it perform identically to the officer's light (Hr.Tr.171-73,185-86). He explained that the alternative light source could render visible substances there had been previously invisible(Hr.Tr.180).

Because photographs of the scene at the Bonnies' showed a lot of beer, Prof.Johnson decided to test whether beer would fluoresce(Hr.Tr.178). He used a model, pouring beer on one arm and bleach on the other(Hr.Tr.182). To allow for some uncertainty over the elapsed time between when Sarah was killed and her body photographed, and to allow for the effect of evaporation of the substances on their fluorescence, Johnson photographed the model's arms immediately after pouring the

substances, again nine hours later, then once each hour for the next ten hours(Hr.Tr.182-84). Prof.Johnson determined that beer and bleach fluoresce very similarly, but he agreed that the fluorescence of beer becomes less distinct more rapidly than bleach(Hr.Tr.195-96,210-11).

Slusher did not know why he did not object to Nichols's testimony for no foundation of expertise or training in recognizing substances under alternative light sources(Hr.Tr.612). He did not recall considering whether to challenge the State's theory that Brian tried to cover up a rape of Sarah(Hr.Tr.611). He also did not recall wondering, given the photographs showing a lot of beer being present, whether substances other than bleach would fluoresce under alternate light sources(Hr.Tr.614-15). Slusher had no strategy for not contesting whether bleach was used in the crime(Hr.Tr.637). When asked whether he would have presented evidence, if available, that Brian poured beer on Sarah, Slusher responded that the rape allegation was unquestionably damaging, and if there were some way to effectively fight it – which he did not think was the case – they would have needed to do so(Hr.Tr.657).

McBride did not think he knew before trial that substances other than bleach would fluoresce under an alternate light source(Hr.Tr.739). He did not investigate the matter, and he did not recall that the lab could not determine that bleach had been poured on Sarah or on the carpet(Hr.Tr.739). He did not know that he would have investigated, because his recollection was that it appeared in photos like something had been poured(Hr.Tr.740-41). When he considered that none of the reports gave any indication when the substance might have been poured on her, or whether it was

something that she might have applied herself, McBride said he could have investigated whether other substances fluoresce(Hr.Tr.742).

The motion court issued its judgment denying relief on December 31,2012(PCR.L.F.194). Notice of appeal was filed February 11,2013(PCR.L.F.196).

To avoid repetition, additional facts will be presented as necessary in the argument.

POINTS RELIED ON

I. Failure to disclose and discover evidence that refuted rape aggravator

The motion court clearly erred in denying Brian's claim that the State failed to disclose, and counsel were ineffective for failing to investigate and present, evidence to refute the statutory aggravators involving Brian allegedly raping Sarah in the course of the murder, denying Brian his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, in that the State was required to disclose as exculpatory evidence, and reasonably competent counsel would have investigated, requested the laboratory data, and discovered, evidence of a peak that excluded Brian from the full DNA profile from the vaginal swab, but instead the State deleted this peak from what it disclosed. Brian was prejudiced because had he known of the evidence before his plea and received competent advice, there is a reasonable probability he would have gone to trial in guilt phase rather than plead guilty. Alternatively, had this evidence been presented, there is a reasonable probability the jury would not have found the aggravators involving rape, or it would have found that mitigation evidence outweighed aggravation, or it would have chosen to sentence Brian to life.

Hill v.Lockhart,474 U.S.52(1985);

Strickler v.Greene,527U.S.263(1999);

Rompilla v.Beard,545 U.S.377(2005);

Wiggins v. Smith,539U.S.510(2003).

II. Failure to disclose additional DNA hits through CODIS, and failure to correct prosecutor's false implication

The motion court clearly erred in denying Brian's claim that the State failed to disclose that they had had additional "hits" in the Y-chromosome database for the profile from the vaginal swab, and Brian's counsel were ineffective for failing to object to the State's questioning that implied that John Sim, who had been disclosed and who shared that profile, was incarcerated at the time of the murders, and failing to investigate and present evidence to refute that implication, denying Brian his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV, in that before trial, the State disclosed a hit on Sim but it failed to disclose additional hits on Timothy Kathcart, Brandon Brown, Jeremy Morgan, and Charles Forbes, and the prosecutor compounded the prejudice by falsely implying in his questioning of DNA analyst Wyckoff that Sim was incarcerated at the time of the murders, but trial counsel failed to investigate and learn that information, and failed to object to the prosecutor's improper questioning. Brian was prejudiced because the information of the hits on Kathcart and Sim, and a correction of the prosecutor's false claim, would have demonstrated more clearly the limits on Y-chromosome DNA "matches," such that there is a reasonable probability the jury would not have found the aggravators involving rape, or it would have found that mitigation evidence outweighed aggravation, or it would have chosen to sentence Brian to life.

Strickler v.Greene,527U.S.263(1999);

Taylor v.State,262 S.W.3d 231(Mo.banc2008);

Rompilla v.Beard,545 U.S.377(2005);

Ervin v.State,80S.W.3d 817(Mo.banc2002).

III. Failure to investigate and present evidence of Brian's inability to deliberate and in support of statutory mitigators

The motion court clearly erred in denying Brian's claim that counsel were ineffective for failing to investigate Brian's mental health and present evidence from Drs. Smith and Daniel that at the time of the murders, the combination of Brian's major depression and polysubstance dependence rendered him unable to deliberate, caused him to act under the influence of extreme mental or emotional disturbance, and rendered him unable to appreciate the criminality of his conduct or conform his conduct to the law, denying Brian his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, in that reasonably competent counsel would have discovered and presented this evidence and had Brian known of the evidence before his plea and received competent advice, there is a reasonable probability he would have gone to trial in guilt phase rather than plead guilty. Alternatively, the jury would have found that the mitigating evidence outweighed the State's aggravating evidence, and thus that it would have returned a verdict of life.

State v.Walkup,220 S.W.3d748(Mo.banc2007);

Rompilla v.Beard,545 U.S.377(2005);

Hutchison v.State,150S.W.3d 292(Mo.banc2004);

Wiggins v.Smith,539U.S.510(2003).

IV. Failure to present medical witnesses and records concerning Brian's treatment for depression and suicide attempts

The motion court clearly erred in denying Brian's claim that counsel were ineffective for failing to present in mitigation testimony and records from Drs. Moline and Lyskowski concerning Brian's treatment for depression, substance dependency, and suicide attempts, denying Brian his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, in that the doctors would have testified that Brian suffered from major depression and substance dependency long before the time of the murders, and reasonably competent counsel would have obtained and presented this evidence to counter the evidence presented in aggravation; had they done so there is a reasonable probability the jury would have returned a verdict of life.

Wiggins v.Taylor,539U.S.510(2003);

Kenley v.Armontrout,937F.2d1298(8th Cir.1991).

V. Failure to object to "junk science" or to counter it.

The motion court clearly erred in denying Brian's claim that counsel were ineffective for failing to object to the State's evidence in support of its theory that Brian poured bleach on Sarah to cover up his alleged rape of her, or in investigating and presenting evidence to refute the State's evidence, denying Brian his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, in that reasonably competent counsel would have: 1) objected and requested a *Frye* hearing, because there was no foundation for Det.Nichols's testimony that an "alternative light source" revealed the presence of a "pour pattern" of bleach on Sarah, or for Wyckoff's testimony that the lab had conducted studies about "chemical insults" to prevent detection of a protein present in semen; or 2) would have presented evidence that other substances –such as beer, which was present at the scene in large amounts – also fluoresce under a similar light source. Had counsel requested a *Frye* hearing and objected to the State's evidence or countered it, there is a reasonable probability the jury would not have found the aggravators involving rape and would not have imposed death.

Ervin v.State,80 S.W.3d 817(Mo.banc2002);

Wiggins v.Smith,539U.S.510(2003);

State v. Davis,814 S.W.2d 593(Mo. banc1991).

VI. Failure to request the replacement of Juror Reddick

The motion court clearly erred in denying Brian's claim that counsel were ineffective for failing to move to replace juror Reddick after he disclosed that he knew Ben Bonnie, denying Brian his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII, XIV, in that when Reddick disclosed after the presentation of evidence had commenced that he had worked with Ben and supervised him, and had a favorable opinion of him, reasonably competent counsel would have sought to replace Reddick with an alternate who was not biased toward a victim or would have re-questioned Reddick about his feelings after he saw graphic crime-scene and autopsy photographs; had counsel sought Reddick's replacement at either stage, there is a reasonable probability the jury would not have imposed death.

Anderson v.State,196S.W.3d 28(Mo.banc2006);

Gray v.Mississippi,481 U.S.648(1987);

Knese v.State,85 S.W.3d 628(Mo.banc2002).

VII. Conflict of interest: Flat Fee

The motion court clearly erred in denying Brian's claim that counsel had a conflict of interest caused by their being limited to a flat fee to represent Brian, denying Brian his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, in that counsel were paid $12,000 each for a death penalty defense, regardless of whether the case resulted in a plea, a full trial of guilt and sentence, or a plea with a sentence-only trial such as occurred. This provided an incentive for counsel to do as little work as possible, creating a "divergence of interests" between Brian and counsel that impacted everything from Brian's decision to plead guilty to how the case was investigated, to what evidence was presented on Brian's behalf. Had counsel not had an actual conflict of interest, Brian would not have pleaded guilty and the jury would not have imposed death.

State v. Roll, 942 S.W.2d 370(Mo.banc1997);

Cuyler v. Sullivan,446 U.S.335(1980);

Mickens v.Taylor,535 U.S.162(2001);

Conger v. State,356 S.W.3d 217(Mo.App.E.D.2011).

ARGUMENT

I. Failure to disclose and discover evidence that refuted rape aggravator

The motion court clearly erred in denying Brian's claim that the State failed to provide, and counsel were ineffective for failing to investigate and present, evidence to refute the statutory aggravators involving Brian allegedly raping Sarah in the course of the murder, denying Brian his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, in that the State was required to disclose as exculpatory evidence, and reasonably competent counsel would have investigated, requested the laboratory data, and discovered, evidence of a peak that excluded Brian from the full DNA profile from the vaginal swab, but instead the State deleted this peak from what it disclosed. Brian was prejudiced because had he known of the evidence before his plea and received competent advice, there is a reasonable probability he would have gone to trial in guilt phase rather than plead guilty. Alternatively, had this evidence been presented, there is a reasonable probability the jury would not have found the aggravators involving rape, or it would have found that mitigation evidence outweighed aggravation, or it would have chosen to sentence Brian to life.

Within the electronic file that the Missouri State Highway Patrol (MSHP) lab did not provide to trial counsel, and counsel failed to request, was evidence that Brian was excluded from the full autosomal DNA profile from the vaginal swabs taken from

Sarah Bonnie. This evidence would have refuted the statutory aggravators that Brian raped Sarah in the course of the murder, and that the murder was wantonly vile, and had it been presented, there is a reasonable probability that the jury would not have found those aggravators proven beyond a reasonable doubt, or if it had, that it would have found that the evidence in mitigation outweighed the aggravation evidence, or that it would have chosen to sentence Brian to life.

Standard of review.

This Court reviews the motion court's findings and conclusions for clear error. ***Morrow v.State***,21S.W.3d819,822(Mo.banc2000); Rule 29.15(k). Findings are clearly erroneous if, after reviewing the entire record, this Court is left with the definite and firm impression that a mistake has been made. ***State v.Taylor***,929 S.W.2d 209(Mo.banc1996).

Right to effective assistance of counsel.

The Sixth Amendment guarantee of the assistance of counsel applies to state prosecutions via the Fourteenth Amendment. ***Gideon v.Wainwright***,372 U.S.335 (1963). This guarantee includes the requirement that the assistance of counsel be effective. ***Cuyler v. Sullivan***,446 U.S. 335(1980). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise the customary skill and diligence reasonably competent counsel would have exercised, and that he was prejudiced. ***Strickland v.Washington***, 466U.S.668, 687(1984). A movant is prejudiced if there is a reasonable probability that but for counsel's errors the result would have been

different.***Deck v.State***,68S.W.3d418,426 (Mo.banc 2002)(discussing ***Strickland***). A reasonable probability is a probability sufficient to undermine confidence in the outcome.*Id*.426. The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death.***Woodson v.North Carolina***,428U.S.280, 305(1976);***Lankford v.Idaho***,500U.S.110,125(1991).

The claim.

Brian alleged that trial counsel failed to investigate the DNA evidence and call an expert, such as Dr. Dean Stetler, to testify at trial regarding the nondiscriminatory nature of Y-chromosome DNA testing and about the State's failure to perform a differential extraction on the vaginal swab to get a full autosomal DNA profile for the male and female fractions of the sample, which would have created a more discriminatory DNA profile for comparison to Brian's profile(PCR.L.F.39). Brian also alleged that Dr.Stetler would have testified about the State's failure to perform a differential extraction, which would have yielded a full autosomal profile for both the male and female portions of the sample, creating reasonable doubt whether Sarah was raped and whether Brian raped her(PCR.L.F.39). He further alleged the State failed to disclose the electronic data from the MSHP lab, and trial counsel failed to request it(PCR.L.F.42).

DNA Trial Evidence.

MSHP analyst Wyckoff first ran a full DNA profile on the vaginal swabs, which were consistent with each other and with Sarah's profile, but Wyckoff did not detect

any DNA on the swabs besides Sarah's(Tr.841-42). Because there were intact sperm cells on a slide made from the swabs, he ran a Y-chromosome test – he assumed what he tested was the sperm cells, but he did not know for sure(Tr.842-45).[7]

The Y-chromosome profile eliminated Ben Bonnie and Darin Carel as contributors to the swab(Tr.845-46). It did not eliminate Brian, but the Y chromosome is passed from father to son and is shared within the male lineage; there are also population groups that share a Y-profile though unrelated(Tr.843-47). This less discriminatory profile would be expected in 2.3 per 1000 individuals in the Caucasian population(Tr.848). Trial counsel did not cross-examine Wyckoff(Tr.849-50).

Post-conviction evidence.

The jury that imposed Brian's death sentences did not hear that Wyckoff had deleted information before sending his report to the prosecutor – the data from which he developed the full profile showed peaks at two particular loci that did not match Sarah, but Wyckoff decided they did not measure up to his standards to include in his report(Hr.Tr.376-78,381-85;Wyckoff.Depo.29-35).

Post-conviction counsel retained Dr. Dean Stetler, professor of Molecular Biosciences at the University of Kansas, to review the DNA evidence(Hr.Tr.341-

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[7] In a post-conviction deposition, submitted by agreement in lieu of testimony (Wyckoff.Depo), Wyckoff agreed that he did not know because he did not do a "differential extraction"(Hr.Tr.366-68;Wyckoff.Depo.68)(Wyckoff's pretrial deposition was admitted as State's Ex.1).

42,345). Along with the material received by trial counsel in discovery, post-conviction counsel obtained and provided to Dr.Stetler the electronic data from the MSHP lab(Tr.345-46).

A full "autosomal" DNA profile consists of 15 different loci with presumably two alleles each(Hr.Tr.356-57). A Y-profile consists of different, and fewer, loci that are specific to the Y chromosome(Hr.Tr.361-62). As Dr.Stetler explained, because the Y-profile is shared throughout the male line, it would not matter if it was a 20th cousin or a relative from 200 years before, and unrelated males can share a Y-profile, making the Y-profile less discriminating than a full profile(Hr.Tr.392-94). The donor of the Y-profile did not necessarily have sexual intercourse with Sarah, because the Y-profile may not have come from sperm(Hr.Tr.395-96).

When Dr.Stetler reviewed the electronic data from the MSHP lab – data that trial counsel did not request or receive – he discovered the deletion of peaks on the full profile from the vaginal swab(Hr.Tr.376-78,381-85;Wyckoff Depo,pp.34-35). A DNA profile is displayed in a graph called an electropherogram; the heights of its peaks are measured in relative fluorescence units("RFU")(Hr.Tr.377-78). The discovery Dr.Stetler reviewed before post-conviction counsel provided him the electronic data was incomplete because it did not include the peak heights(Hr.Tr.378).

Dr.Stetler explained that there are standards for whether a peak depicts an allele, which is part of the DNA profile, and what may be ignored as "stutter" – not a true allele(Hr.Tr.378,387). The FBI protocol for peak heights is 200 RFU for inclusion purposes, but 50 RFU can be used to exclude someone as a possible donor to a

sample(Hr.Tr.378). Dr.Stetler said the MSHP lab also uses a 50 RFU cut-off; he was familiar with their standards from reviewing casefiles(Hr.Tr.379). The electropherogram for the full profile from the vaginal swab that was disclosed to trial counsel showed peaks for alleles 10 and 12 at the CSF locus which were consistent with Sarah's profile(Hr.Tr.381-82). It did not show any other peaks, though it did have what Dr.Stetler referred to as a "shoulder" between the 10 and 12 peaks, but because the disclosed electropherogram(M.Ex.MM;App.A-58) was not detailed, and it apparently was not designated as an allele by the computer, Dr.Stetler assumed it was too small for the computer to count(Hr.Tr.379-82).

When Dr.Stetler obtained the electronic data, it revealed an 11 allele for the CSF locus with an 84 RFU height(Hr.Tr.384-85;Wyckoff.Depo.Ex.NN-3;App.A-59). The computer had classified it as an allele, but that information was not on the materials disclosed to the defense (Hr.Tr.385-86). 84 RFU was above the 50-RFU cut-off of the FBI and MSHP for exclusion(Hr.Tr.386). An 11 allele at that locus could not have been contributed by Sarah or Brian(Hr.Tr.386-87). A factor used in determining whether a particular peak is a true allele is a height no less than 9.2% of the adjacent allele(Hr.Tr.387-88). The "11" allele met that standard – meaning there was a donor other than Sarah and Brian(Hr.Tr.388-89).

The fact that Brian could not have been the donor of the 11 allele was not affected by the Y-profile possibly including him(Hr.Tr.395). Ben's full profile had an 11 allele at that locus, so he was a possible contributor, but neither Wyckoff's report nor his testimony mentioned this(Hr.Tr.390). Dr.Stetler became aware of the allele only

by reviewing the electronic data – the "shoulder" on the report disclosed to trial counsel did not have enough detail to tell him the peak height or that the MSHP computer had classified it as an allele(Hr.Tr.385,390-91). In Dr.Stetler's experience, the MSHP lab normally included peak height data in their printed reports; it was not only in the electronic data(Hr.Tr.391).

When deposed, Wyckoff testified that the peak at 11 in his electronic data was a stutter, not an allele, and occurred during analysis(Wyckoff.Depo.13-15). Wyckoff said the lab's computer uses 50 RFU as a minimum to detect a peak, but other factors are involved in deciding whether it is an allele, including a relative peak height of no less than 15% of the adjacent peak, and reviewing the entire profile to determine whether there are peaks in other locations that are not characteristic of stutter, which would indicate that he was dealing with a mixture(Wyckoff.Depo.17-19). The resolution of these factors is left to the analyst's discretion(Wyckoff.Depo.33-34).

Wyckoff said the peak at 11 was stutter because at 84 RFU it was only 10% of the 840 RFU of the allele at 12(Wyckoff.Depo.17-19). The 15% factor in determining an artifact was based on studies by the MSHP lab(Wyckoff.Depo.34). He later said the 15% standard and whether something is stutter is discretionary from lab to lab and analyst to analyst(Wyckoff.Depo.40,44-45). Wyckoff is not aware of any studies showing the percentage for peak height variation at the CSF locus is 10% or less, but he agreed a peak at 10% of the height of the adjacent allele might be an allele, based upon the entire profile(Wyckoff.Depo.44,47).

Wyckoff also removed a peak at 23 at the FGA locus, with a peak height of 107RFU, or 14.2% of the adjacent allele(Wyckoff.Depo.47-49). According to Wyckoff, that was also not an allele(Wyckoff.Depo.47). Part of his reason was that there was no mixture at any other locations(Wyckoff.Depo.49-50). The 23 peak Wyckoff struck was also an allele in Ben's profile(M.Ex.JJ,NN).

Wyckoff testified his removal of the stutter was disclosed in his original report; Ex.II-1 attached to the deposition[8] states, "removed stutter 10% at CSF and 14% at FGA[.]"(Wyckoff.Depo.22-23). The report does not note the number of the peak/allele(Ex.II-1). Wyckoff agreed his original report did not include peak heights, but that is in the electronic discovery, which counsel could have had they asked(Wyckoff.Depo.83-86). His records show no request(Wyckoff.Depo.85).

Wyckoff said he removes stutter so it does not interfere with reviewing the allele designations, but he agreed he would be the one doing such review; no one else would know he removed a peak without having his data(Wyckoff.Depo.35). Wyckoff knew there had to be two people represented in the DNA from the vaginal swab, but he did "not want this profile from [Depo.Ex.]NN-3 to be determined as a mix sample because it appears to me to be single source."(Wyckoff Depo.75).[9] Wyckoff's results

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[8] Exhibit II-1 is a page from Movant's Exhibit II admitted in the evidentiary hearing, which was a copy of the discovery supplied to trial counsel(Hr.Tr.346-47).

[9] NN-3 is the electronic electropherogram from the vaginal swab with the CSF and FGA peaks highlighted(App.A-59).

do not preclude the possibility that the donors of the Y-profile and the sperm cells were different people(Wyckoff.Depo.77).

When a sample being analyzed contains sperm, as in the case of the vaginal swabs in this case, it is possible to do a "differential" extraction, in which the DNA from the sperm can be removed separately(Hr.Tr.366-67). But if, as was done here, an extraction is done without separating the sperm, it is not possible to tell whether the DNA is from the sperm or another cell in the sample(Hr.Tr.365,368). If a differential extraction is not done initially, it is not possible to go back and do so later to develop a full profile specifically from the sperm(Hr.Tr.369-70). Had Wyckoff done a differential extraction initially, he could have done both the full and Y-profiles without using up the sample(Hr.Tr.370).

Wyckoff said he did a standard extraction after the protein test did not confirm semen in the swab because he then had no reason to believe sperm would be present, even though he was told about possible sexual activity and found intact sperm on a slide prepared from the swab before the extraction(Wyckoff.Depo.66-67;Hr.Tr.371-73). He said it was "not ideal" to go back and do a differential extraction at that point, because the sperm had been sitting in water for at least a day, so the DNA may no longer have been there(Wyckoff.Depo.68).

Brian Hoey, then DNA supervisor at the MSHP lab, testified the peak height standard is 50 RFU(Hr.Tr.412-14). Hoey agreed with Wyckoff that the 84 RFU peak at 11 for the CSF locus was probably stutter, though under his definition, a stutter would be a peak where there is a mixture of DNA, adding that it would be

irresponsible to call something a stutter if there were any indication that there was a DNA profile masked in another profile(Hr.Tr.440-41). In his pretrial deposition, Wyckoff said one reason he ran the Y-profile was that the full profile had "so much female DNA that it masked any male DNA that was there"(Ex.1.40).

Hoey testified that generally, a peak height of at least 15% of the adjacent peak is necessary to avoid classification as stutter, then he said that the percentage is different for each locus(Hr.Tr.442-43,446). He agreed it was possible the percentage for the CSF locus was as low as 9.2%, in which case the 10% in Brian's case would be above the threshold(Hr.Tr.449-50). Hoey's assessment of the peak at 11 as stutter was based only on what he was shown in court; he had not reviewed the complete case file, but he felt his assessment would not change(Hr.Tr.463).

Trial counsel's testimony.

Scott McBride primarily dealt with the DNA evidence(Hr.Tr.671-72). He received discovery at the end of February 2008(Hr.Tr.672-73). McBride received approval for $1,500 from the Public Defender System for a DNA expert, to determine the admissibility of Y-profile evidence, but he did not contract with a lab or otherwise spend the available funds(Hr.Tr.674-78). A lab he contacted about possible services required the electronic data before giving an opinion(Hr.Tr.678-79;M.Ex.OO). McBride's investigation of the DNA evidence consisted of reviewing the discovery and deposing Wyckoff(Hr.Tr.677). He did not recall whether he reviewed the DNA

discovery before Brian pleaded guilty(Hr.Tr.676-77). Nor did he recall whether he requested the electronic data; he believed he did not get it(Hr.Tr.679-80).

McBride's investigation of the two rape-related aggravators was primarily through the discovery(Hr.Tr.680). Upon reviewing M.Ex.MM and NN, McBride said he did not recall seeing electropherograms showing peak heights ever before, and he did not recall receiving the electronic data in Brian's case(Hr.Tr.685,687). After Brian decided to plead guilty, the focus became an appeal for mercy, but McBride would have wanted to know the information in the electronic discovery before making a decision about whether to challenge the rape aggravators(Hr.Tr.689-90).

The findings.

The motion court found that Brian did not prove prejudice, because there was no evidence that differential extraction would have produced exculpatory evidence (PCR.L.F.164-65). The court also found that the DNA evidence had no real impact on the voluntariness of Brian's pleas to the murders, that it went only to the question whether Brian raped Sarah, which was used as an aggravator, and that contesting the DNA evidence was fundamentally at odds with the core strategy of accepting responsibility(PCR.L.F.165).

The court further found that Brian's claims that the State failed to provide the information that it had removed a peak, and did not disclose that that peak would have excluded Brian as a contributor, were not in the amended motion(PCR.L.F.165-66). The court also found that the claim was refuted by the State's evidence that

purportedly demonstrated Dr.Stetler's conclusions were inaccurate(PCR.L.F.165). Specifically, it found that Wyckoff's original report that was disclosed to trial counsel stated, "removed stutter 10% at CSF and 14% at FGA."(referring to Ex.II-1 to Wyckoff PCR deposition)(PCR.L.F.167).

As to Brian's claim that the State failed to perform a differential extraction in order to get a complete profile of the sperm fraction of the vaginal swab, the court found that Wyckoff gave reasons for his failure – that semen was not confirmed on the swab, possibly due to the application of bleach(referring to Ex.II-2;St.Ex.1.40-41)(PCR.L.F.167-69). The court relied on caselaw that the State's failure to gather or present certain types of evidence is not admissible, thus trial counsel could not have argued an adverse inference from the failure to do a differential extraction (PCR.L.F.169-70). The court also noted that Wyckoff acknowledged in his trial testimony that the Y-chromosome DNA profile was likely to show up greater than 2.3 times per 1,000 people, and the jury heard that one other person in the DNA database had that profile, thus the jury knew that the evidence was not conclusive(PCR.L.F.169-70).

The court concluded: 1)Brian made no "significant challenge" to the reasonableness of the strategy to not challenge the evidence of rape, because there was no evidence that Brian ever denied to anyone that he raped Sarah; 2)the strategy was to take full responsibility for the crime, show remorse, and minimize the amount of time the issue of rape was before the jury; and 3)counsel was not ineffective for

avoiding a strategy that would "refocus the jury on the brutal facts of the crime." *Citing*, ***Taylor v.State***,126 S.W.3d 755,762(Mo.banc 2004)(PCR.L.F.170-71).

The court further concluded that although it could be argued that trial counsel could have decided to challenge the DNA evidence, such a challenge, "would have 1) been ultimately unsuccessful, and 2) negated any legitimate argument that [Brian] had accepted responsibility and was entitled to mercy from the jury."(PCR.L.F.171). The court said that under ***Strickland***, counsel can "make a reasonable decision that makes particular investigations unnecessary."(PCR.L.F.171). The court felt it was reasonable for counsel to have feared angering the jury by asserting that Brian did not rape Sarah, since the evidence "so strongly suggest[ed]" that he did(PCR.L.F.171).

The court finally concluded that challenging the DNA evidence and evidence of covering up a rape with bleach, and bringing in a psychiatrist "to make assertions that the State categorize[d] as outlandish,"[10] would have created a "great risk of destroying any credibility the defense had in expressing remorse over these murders and asking for mercy."(PCR.L.F.171). Therefore, counsels' decision not to conduct such a defense was reasonable trial strategy, though ultimately unsuccessful(PCR.L.F.172).

The requirements of a valid guilty plea.

To be valid and binding, a guilty plea must be entered voluntarily and intelligently.***Boykin v.Alabama***,395U.S.238,242(1969). The questions are whether

[10] The court did not specify what "outlandish" assertions Dr.Daniel made, or whether the court also felt they were outlandish.

the plea was "an intelligent act done with sufficient awareness of the relevant circumstances and likely consequences,"***McMann v.Richardson***,397 U.S.759, 766(1970); and "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant."***Hill v.Lockhart***,474 U.S.52, 56(1985). Because the State did not disclose exculpatory evidence and counsel did not investigate the State's case, Brian's pleas were not entered with sufficient awareness of his circumstances: that evidence existed that he did not rape Sarah, thus potentially removing two of the State's four aggravators.

The State violated *Brady*.

Brian first notes that this claim was in his amended motion. He alleged that the packet of materials the State furnished to trial counsel regarding the DNA testing, "did not include any electronic data from the [MSHP] regarding the DNA testing[.]"(PCR.L.F.42). Therefore, he specifically pled that the State failed to disclose the data – that revealed the peak Wyckoff deleted. Contrary to the motion court's statement, this claim was in the amended motion.

The State's suppression of evidence favorable to the accused violates due process. ***Brady v.Maryland***,373 U.S.83(1963). A prosecuting attorney has a broad duty "to disclose evidence in [his or her] possession that is favorable to the accused and material to guilt or punishment."***State v.Goodwin***,43 S.W.3d 805,812(Mo.banc 2001), *citing* ***Brady***,373 U.S.87. The State must reveal any information helpful to the defense whether requested or not.***United States v.Bagley***,476 U.S.667,675(1985).

"The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." ***Kyles v. Whitley***,514 U.S.419,434(1995).

A prosecuting attorney violates due process if: (1) he or she does not disclose evidence that is favorable to the accused because it is either exculpatory or impeaching, (2) the prosecuting attorney has suppressed the evidence, either intentionally or inadvertently, and (3) the undisclosed evidence is material.***Strickler v. Greene***,527U.S.263,280-81(1999). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."***Bagley***,473U.S.682. "Moreover, the rule encompasses evidence 'known only to police investigators and not to the prosecutor.'"***Strickler v.Greene***,527U.S.280-81. "In order to comply with ***Brady***, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.'" *Id*., *citing* ***Kyles***,514 U.S.437.

Here, the State's agent Wyckoff actively deleted from his report the fact that there was a peak at a particular locus that would have excluded Brian as a contributor to the full autosomal profile developed from the vaginal swab. That evidence would have cast significant doubt on the State's theory that Brian raped Sarah, and that he tried to cover up that crime by pouring bleach on her. It thus not only would have called into

question two of the aggravators the State alleged,[11] but also thereby impacted the State's theory and its supporting evidence on the element of deliberation.

That is why the State's action impacted the voluntariness of Brian's pleas. The allegation that Brian raped Sarah was a significant part of the State's case in aggravation, and it was a prime factor in counsels' advice to Brian to plead guilty and seek mercy from the jury. But counsel did not know, because Wyckoff deleted it, that there was doubt about the strength of the State's case.

This act of actively removing a source of doubt from the State's case was extremely improper and prejudicial. The motion court's finding that Wyckoff noted on Ex.II-1 that he deleted "stutter"(PCR.L.F.167), was not sufficient to comply with the State's obligation to turn over exculpatory evidence. Simply telling the defense that the State has deleted a significant item from its report is not the same as providing it. The State cannot remove important information then defend its action by claiming that the defense was put on notice that it had been removed.

Counsel were ineffective in failing to investigate and properly advise Brian.

Counsel did not take long to review the case and arrive at the feeling that guilt phase would be "difficult"(Hr.Tr.570). McBride could not even recall reviewing the DNA materials before the plea(Hr.Tr.676-77). So what happened is that without any investigation, counsel accepted the State's evidence without question and decided to

[11] The allegation that Sarah's murder involved "depravity of mind" was based solely on the allegation of rape(L.F.178).

focus on mitigation. Then they ignored a significant aspect of the State's case in aggravation, seeking only to get "credit" from the jury by pleading guilty.

While trial counsel may make reasonable strategy decisions, they may not do so in the absence of a reasonable investigation. In ***Rompilla v.Beard***, in holding that a lawyer "is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial[,]" the Supreme Court quoted from 1 ABA Standards for Criminal Justice 4-4.1(2d ed.1982 Supp.):

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. *The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty*.

545 U.S.377,387(2005)(emphasis added).

Counsels' decision to ignore the issue of guilt and focus instead on "credit" from the jury for Brian's pleas, was not done after adequate investigation, violating their duty to give Brian proper advice before he pleaded guilty. And that invalidated those pleas as not made with sufficient awareness of all the relevant circumstances.

"Counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when he has not yet obtained the facts on which such a decision could be made."***Kenley v.Armontrout***,937F.2d1298,1308 (8thCir.1991). Brian's counsel did not obtain all of the facts before deciding not to challenge the DNA evidence.

Counsel was approved by the Public Defender System to expend $1,500 in investigating the DNA, yet they did not spend a penny(Hr.Tr.674-78). In other words, counsel did absolutely <u>no</u> investigation of the DNA evidence. They reviewed the State's discovery and stopped. Had they investigated, they would have discovered, as Dr.Stetler did, that Wyckoff actively deleted exculpatory evidence from his report. Even the "shoulder" noted by Dr.Stetler should have alerted counsel that there was more to the data than Wyckoff's report disclosed. The motion court's finding that counsel made a reasonable strategy decision to avoid the evidence of rape(PCR.L.F.170-72) – i.e. the DNA evidence – is clearly erroneous because counsel undertook no investigation before deciding on a strategy. ***Kenley v.Armontrout***.

Further, this did not go only to the rape aggravators. The lack of a defense to the allegation of rape was an important part of the decision to plead – not only did it place Brian at the scene, it was evidence of criminal conduct against Sarah and further evidence of deliberation. Without that evidence, or at least with defense evidence to counter it, a piece of the State's case would have been significantly weakened, and it would have changed counsels' opinion that guilt phase would be "difficult."

When a movant pleads guilty, claims of ineffective assistance of counsel are only relevant as they affect the voluntariness and understanding with which the plea was made.***Cooper v.State***,356 S.W.3d 148,153(Mo.banc2011). To prevail on a claim of ineffective assistance of counsel, the movant must show a reasonable probability that but for counsel's ineffectiveness, he would not have pled guilty but would have gone to trial.*Id*. Brian was told that he had no defense to murder,[12] and that due to the allegation of rape, his best strategy was to forget defending anything and just place his hopes in counsels' ability to make the jury credit him for admitting guilt. That was not an informed strategy, and it was not an informed plea.

The DNA evidence should have been presented to counter the State's aggravators.

The State's failure to disclose its deletion of material information, and counsels' failure to fully investigate and discover that a peak that excluded Brian was "clicked off" by Wyckoff, meant that Brian's pleas were not fully informed, because he did not know about evidence that could have led to the jury's finding that he did not deliberate, or that might have reduced the risks of taking the issue of guilt to a jury. But even if the Court does not accept those arguments, the State's and counsels' failures also meant that Brian had a less than fair trial when it came to the jury's weighing the evidence in aggravation and mitigation.

The evidence of rape was an extremely emotional aggravator. It is considered by some at least as vile an act as murder. But according to the motion court, counsels'

[12] But see Point III, *infra*.

strategy to just ignore the issue as much as possible – in hopes that the jury might not give it as much weight if they just did not say too much about it – was reasonable.(PCR.L.F.171-72).

But counsels' trial strategy could not have been reasonable where they did not do a complete investigation of the DNA evidence, and where the State did not fulfill its obligation to disclose exculpatory evidence. To go into trial without knowing that there was a glaring weakness in two of the State's aggravators is inexcusable, and no decision made on the basis of less than the full results of the DNA testing can in any way be considered reasonable trial strategy.***Rompilla***,545 U.S.387. Also, counsel "has a duty 'to neutralize the aggravating circumstances advanced by the state.'"***Glass v.State***,227 S.W.3d 463,469(Mo.banc2007),*quoting* ***Ervin v.State***,80 S.W.3d 817,827(Mo.banc2002);also citing ***Wiggins v.Smith***,539U.S.510,524(2003).

Counsel made no attempt to neutralize the most highly emotional aspect of the State's case – the claim that Brian raped his own cousin. Instead, they first walked Brian into a penalty-only trial, then had no questions for the State's DNA analyst, preferring not to draw the rape to the jury's attention – as if it were not already the dominant issue in the case. If that was a "strategy," it was one of burying their heads in the sand.

At the core, the motion court fundamentally misunderstood its function. It found that a challenge to the DNA evidence would have been unsuccessful(PCR.L.F.171). In so doing, it engaged in fact-weighing that was not for that court to perform. A state post-conviction judge's findings that a witness in the proceeding is not convincing

does not defeat a claim of prejudice.***Kyles v.Whitley***,514U.S.449,n.19. Such an observation could not substitute for the jury's appraisal at the time of trial.*Id*. Credibility of a witness is for the jury, not the post-conviction court.***Antwine v.Delo***, 54F.3d1357,1365(8thCir.1995).

The issue in the post-conviction case was not whether Dr.Stetler or Wyckoff was correct about the appropriate standard for determining an allele versus a stutter. The question was whether there was a reasonable probability that a jury would give Dr.Stetler's significantly more thorough and comprehensive evaluation more weight.***Strickland***,466 U.S.694. This is not an outcome-determinative test, as the motion court in essence applied. *Id*.693-94; ***Deck***,68S.W.3d 427.

And the issue was not whether Brian never "denied" raping Sarah(PCR.L.F.170). That not only improperly shifted the burden to Brian to prove his innocence, it also ignored the evidence that Brian had no memory of doing so(Tr.899), and that Dr.Daniel found no sexual deviation disorder(Hr.Tr.308).

Finally, even if the jury still found one or more statutory aggravators had been proven beyond a reasonable doubt, that still would not mean that they had to return a verdict of death.§565.030.4(3). "The question is whether, when all the mitigation evidence is added together, is there[*sic*] a reasonable probability that the outcome would have been different?"***Hutchison v.State***,150S.W.3d 292,306(Mo.banc2004). Any doubt cast on the State's evidence linking Brian to rape would have made it more likely that they would have chosen life instead. The jury was free to consider anything in mitigation, ***Lockett v. Ohio***438 U.S.586,604 (1978), and evidence of the

removal of two peaks from the full DNA profile that just happened to match Sarah's husband and not Brian would have to have had some impact on that decision. There is more than a reasonable probability of a different outcome.***Strickland***.

For the foregoing reasons, the motion court clearly erred in denying Brian's claims that either the State should have disclosed or counsel should have investigated and learned of evidence that cast doubt on the State's evidence that Brian raped Sarah. Those failures made Brian's pleas uninformed and involuntary, or in the alternative, the evidence should have been presented to refute the State's aggravators related to the alleged rape and mitigate punishment. Brian therefore asks this Court to vacate those pleas or at a minimum remand for a new penalty phase.

II. Failure to disclose additional DNA hits through CODIS, and failure to correct prosecutor's false implication

The motion court clearly erred in denying Brian's claim that the State failed to disclose that they had had additional "hits" in the Y-chromosome database for the profile from the vaginal swab, and Brian's counsel were ineffective for failing to object to the State's questioning that implied that John Sim, who had been disclosed and who shared that profile, was incarcerated at the time of the murders, and failing to investigate and present evidence to refute that implication, denying Brian his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV, in that before trial, the State disclosed a hit on Sim but it failed to disclose additional hits on Timothy Kathcart, Brandon Brown, Jeremy Morgan, and Charles Forbes, and the prosecutor compounded the prejudice by falsely implying in his questioning of DNA analyst Wyckoff that Sim was incarcerated at the time of the murders, but trial counsel failed to investigate and learn that information, and failed to object to the prosecutor's improper questioning. Brian was prejudiced because the information of the hits on Kathcart and Sim, and a correction of the prosecutor's false claim, would have demonstrated more clearly the limits on Y-chromosome DNA "matches," such that there is a reasonable probability the jury would not have found the aggravators involving rape, or it would have found that mitigation evidence outweighed aggravation, or it would have chosen to sentence Brian to life.

The evidence.

The State's DNA analyst, Jason Wyckoff, testified at trial that because he had been told about a possible sexual assault, but did not find a mixture when he did a "routine" DNA test on the swab, he ran a Y-chromosome test that yields a profile for the male portion only(Tr.840-43). Wyckoff assumed the material he tested was the sperm cells, but he could not tell whether that was actually the case(Tr.842-45). He compared the Y-profile from the swab to the known samples from Brian, Ben Bonnie, and Darin Carel, and determined that Ben and Darin were eliminated, but Brian's Y-profile was the same(Tr.845-47). The Y chromosome is passed from father to son, it is shared within the male lineage; also there are population groups that share a Y chromosome profile who are not related(Tr.843-47). That profile was also shared, on average, by 2.3 people per thousand(Tr.848).

Dr.Stetler explained in the post-conviction hearing that although the Y-profile from the swab was consistent with Brian's profile and inconsistent with Ben's and Darin's, that "consistent with" was not the same as "came from;" it meant that the numbers were consistent(Hr.Tr.363). When discussing the fact that the Y-profile is shared throughout the male line, including all males on one's father's side of the family, not just ancestors, he added that it would not matter if it was a 20th cousin or a relative from 200 years before, and that unrelated males can share a Y-profile; that is why the Y-profile is less discriminating than a full autosomal profile(Hr.Tr.392-94).

The prosecutor asked Wyckoff at trial about a second "hit" on the Y-profile, on a man named John Sim, whose DNA was coded when he entered the Department of Corrections(Tr.848-49). The prosecutor continued:

> Q. And Mr. Sim[] was, at that time and at the relevant times in this case, in prison, was he not?
>
> A. I don't have that information.
>
> Q. But that's where that was developed from, if Mr. Sim[] was – the Sim[] sample was coded when he entered the Department of Corrections; correct? Isn't that the database it came from?
>
> A. Yes.

(Tr.849). Brian presented evidence in the post-conviction case that Sim was not in custody at the time; he had been released in August 2005 and did not go back until July 2007(M.Ex.RR;admitted;Hr.Tr.465).

In 2008, Brian Hoey was the MSHP lab's DNA supervisor(Hr.Tr.411-13). Hoey notified the Callaway prosecutor about the CODIS hit on Sim in May 2008(Hr.Tr.414-15). The lab originally notified prosecutors of every hit, but over time they found that they were getting "countless" numbers of hits on that database, meaning the Y-profiles were not of much value, so they phased out automatic searches(Hr.Tr.428-33,459-60). Before that, on August 20, 2008 – six days before trial – the lab generated another hit on the Y-profile, on Timothy Kathcart(Hr.Tr.427). The lab did not report any other hits to the prosecutor because of all the matches being generated, though there had been searches done and matches made(Hr.Tr.432-34).

Hoey said the information about the other matches about which the prosecutor was not notified was "probably available" to him in August 2008(Hr.Tr.431-32).

There were additional hits on October 29, 2008, and June 11 and August 12, 2009, to Brandon Brown, Jeremy Morgan, and Charles Forbes(Hr.Tr.427-28). Hoey admitted that information was probably available to him in August 2008, but he had no reason to go looking for it(Hr.Tr.431-32). None of these men – Sim, Kathcart, Brown, Morgan, Forbes – were incarcerated on December 23-24, 2007 (M.Ex.RR,SS,TT,UU,VV;Hr.Tr.465-67).

Neighbors of the Bonnies heard loud vehicles in the area on the night Ben and Sarah were murdered. Carol Verslues, who lived nearby but on a different county road, was home on December 23 and was having trouble sleeping(Hr.Tr.475-76). She heard a loud truck go back and forth several times from her road to the Bonnies' road; she first heard it around 1:00 – 1:30a.m.(Hr.Tr.476,481). She also recalled that all of the approximately fifteen dogs in the neighborhood were barking(Hr.Tr.476-77). Hearing trucks isn't particularly notable, and if one or two dogs are barking she would not pay a lot of attention, but she took notice because all the dogs in neighborhood were barking, so she knew something was going on(Hr.Tr.481). Ms. Verslues told a sheriff's deputy on December 24 the same as she had testified at the post-conviction hearing, and she would have testified to the same at trial, but she was never contacted by trial counsel(Hr.Tr.477-78).

Robert Kelsey lived "next door" to the Bonnies, though the houses were not that close together, perhaps 100 yards apart(Hr.Tr.483-84). He recalled hearing a vehicle

with a loud exhaust go to the Bonnies' that night(Hr.Tr.484-85). He agreed that he spoke with a deputy about what he had heard and what he had told the deputy would be accurate(Hr.Tr.485-86). Kelsey told Deputy Roberts that he heard a truck go to the Bonnies' house around 9:30 p.m., that it left about fifteen minutes later, then returned around 10:30 p.m.(Hr.Tr.486-87;M.Ex.M).[13] He told Roberts it was again there for about fifteen minutes and left(Hr.Tr.487;M.Ex.M). Kelsey was not contacted by Brian's trial counsel; if he had been subpoenaed to trial he would have testified as he did in the evidentiary hearing(Hr.Tr.487-88). Kelsey's girlfriend, Nancy Renk, lived at the same address(Hr.Tr.488). She recalled the loud truck and its comings and goings similarly to what Kelsey remembered(Hr.Tr.495-98).

Trial counsel McBride would have wanted to know about the additional CODIS hits before trial; if nothing else, he would have followed up with Wyckoff before trial(Hr.Tr.692-94). He did not do any investigation after the hit on Sim was disclosed(Hr.Tr.697). Counsel were aware that Sim had been identified sharing the Y-profile, and they made a decision not to blame the offense on him, because they saw no benefit to Brian in doing so(Hr.Tr.730). But when asked whether knowing about three or four others would have changed things, McBride said he did not know, but he thought that the more people named, the more he "would have wanted to explore that."(Hr.Tr.730). He explained that having one other named person, and a frequency of 2.3 per thousand, was one thing, but having five, six, or seven would

[13] Exhibit M is the initial discovery provided to the defense.

have changed the dynamics(Hr.Tr.731). He felt that it would not have done so enough to change the jury's focus from their strategy(Hr.Tr.731).

McBride did not object when the prosecutor implied through his questions to Wyckoff that Sim was in custody at the time of the murders(Hr.Tr.699). When asked why he did not object, McBride answered that he thought their position was better the less they talked about the evidence of rape(Hr.Tr.699). He was not saying he would not object to false and misleading information from the prosecutor, just that he did not know it was false at the time(Hr.Tr.699-700).

***The claim and findings*.**

Brian claimed the State failed to disclose exculpatory information – the hits on Sim, Kathcart, Brown, Morgan, and Forbes – and that the prosecutor falsely implied to the jury that Sim, the lone person who matched the Y-profile and had been disclosed – was incarcerated at the time of the murders(PCR.L.F.44-46,55-57). Brian further alleged that this information was material to the two aggravators involving the alleged rape(PCR.L.F.44).

The motion court found that in a letter from the prosecutor to trial counsel that was attached to Ex.1, Wyckoff's pretrial deposition, the prosecutor informed counsel of the hit on Sim, saying it would not be unlikely that there would be "other males in the world" with the same profile, that some of those males had provided DNA samples to DOC, and would be identifiable, especially since approximately 1,700 profiles were

being added to the database each month"(PCR.L.F.172-73). The court also noted that Wyckoff mentioned that to McBride in the pretrial deposition (PCR.L.F.173-74).

The court said Brian's theory – although he unquestionably murdered Ben and Sarah and locked the door to keep Jade out of their room, that "someone else came into that locked bedroom and raped [Sarah's] dead body[,]" – was implausible and that none of the four lived in or was shown to be in Callaway County at the time, or that any knew the victims(PCR.L.F.174-75). It said that after the jury was told about the hit on Sim, the others added nothing exculpatory, and that as a mere suspicion, such evidence would not have been admitted before the jury(PCR.L.F.175-76). It said counsel testified that they would not have made such an unreasonable claim (PCR.L.F.176).

The court concluded there was no ***Brady***[14] violation, and that trial counsel could not have asserted that any of the other men committed the rape, nor would any reasonable attorney have asserted that defense, given that Brian admitted committing the murders(PCR.L.F.174-75).

Standard of review.

This Court reviews the motion court's findings and conclusions for clear error. ***Morrow v.State***, 21S.W.3d819,822(Mo.banc2000);Rule 29.15(k). Findings are clearly erroneous if, after reviewing the entire record, this Court is left with the definite and firm impression that a mistake has been made.***State v.Taylor***,929 S.W.2d

[14] ***Brady v.Maryland***,373 U.S.83(1963).

209(Mo.banc1996). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death.***Woodson v.North Carolina***,428U.S. 280,305(1976);***Lankford v. Idaho***,500U.S.110,125(1991).

The State violated *Brady***.**

As set out in detail in Point I, the State has a broad duty "to disclose evidence in [his or her] possession that is favorable to the accused and material to guilt or punishment."***State v. Goodwin***,43 S.W.3d 805,812(Mo.banc 2001),*citing* ***Brady***, 373 U.S.87. It must reveal helpful information whether requested or not. ***United States v. Bagley***,476 U.S.667,675(1985). The question is whether in the absence of the evidence the defendant received a fair trial, resulting in a verdict worthy of confidence.***Kyles v.Whitley***,514 U.S.419,434(1995).

A prosecuting attorney violates due process if he intentionally or inadvertently does not disclose material exculpatory or impeaching evidence to the accused.***Strickler v.Greene***,527 U.S.263,280-81(1999). Evidence is material if there is a reasonable probability of a different result.***Bagley***,473 U.S.682;***Taylor v.State***,262 S.W.3d 231,243(Mo.banc2008). This requirement includes "evidence 'known only to police investigators and not to the prosecutor.'"***Strickler***,527 U.S.280-81. To comply with ***Brady***, the "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Id.*, *citing* ***Kyles***,514 U.S.437.

In ***Taylor v.State***, the State failed to disclose evidence that would have impeached its critical jailhouse snitch witness and required reversing the penalty phase.262 S.W.3d 237-48. The evidence the State failed to disclose here would have gone to impeach the State's theory that Brian raped Sarah. That theory was built largely on the strength of the Y-profile evidence that was consistent with Brian's Y-profile but inconsistent with Ben Bonnie and Darin Carel, the only other males in the home at the end of the evening(Tr.586,845-47).[15] But, known to the State and/or its crime lab, but unknown to defense counsel, that profile was also consistent with Sim, Kathcart, Brown, Morgan, and Forbes(Hr.Tr.414-15,427-28).

This large number of hits is emblematic of the reason the lab quit automatically informing prosecutors of hits, and it also plainly illustrates Dr.Stetler's testimony that the Y-profile is not very discriminatory(Hr.Tr.392-94). In fact, with 2.3 matches per thousand population on average, this Court can readily determine that that would mean approximately 60 males just in Callaway and its adjoining counties of Boone and Cole.[16] So this is by no means a unique identifier.

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[15] Another male was present for part of that evening – Jon Sheley, Sarah's sister's husband(Tr.564-65,577); there was no evidence his DNA was tested.

[16] The 2011-2012 Blue Book lists the county populations as Boone 162,642; Callaway 44,332; and Cole 75,990; for a total of 282,964. Assuming half, 140,000, are male, 2.3/1000 yields approximately 60.

The motion court's finding that the State complied with its obligation under ***Brady*** by informing counsel that, based on the 2.3 per thousand figure, more matches "would not be unlikely"(PCR.L.F.172-73) is clearly erroneous because such a general statement does not begin to satisfy the State's obligation to disclose specific people it had identified, including not only Katchcart, who was identified before trial, but the others named later, but whom Hoey admitted the lab "probably" had knowledge of in August before trial(Hr.Tr.431-32). Telling counsel that statistically there may be more is a far cry from telling disclosing the known fact – in the case of Kathcart – and the "probable" fact – concerning Brown, Morgan, and Forbes – that specific matches had been found. In ***Taylor v. State*** this Court held that the prosecutor's mere consideration of writing a letter to a second prosecutor on behalf of a testifying witness should have been disclosed.262 S.W.3d 242-43.

Here there were five matches of the Y-profile – evidence that the DNA evidence was of limited value in implicating Brian, a potential defense. McBride thought the more people named, the more he "would have wanted to explore that."(Hr.Tr.730). Had he investigated Sim, he would have discovered the other matches and would also have been motivated to spend money he had been allocated to investigate the other aspects of the DNA evidence(See Point I). Having one other named person, and a frequency of 2.3 per thousand, was one thing, but having several would have changed the dynamics(Hr.Tr.731). Although he felt that it would not have done so enough to warrant changing the jury's focus from their strategy(Hr.Tr.731), if combined with the other DNA evidence counsel did not investigate(See Point I), there was a significant

argument that Brian did not rape Sarah, thus removing the most emotional two of the four aggravators alleged by the State.

As to the motion court's labeling as "implausible" that Brian murdered Ben and Sarah but someone else raped Sarah (PCR.L.F.174-75), the court failed to take into account that Dr.Daniel testified that Brian did not remember shooting them, and that his pleas and his statement to Dr.Smith were probably based on his having accepted responsibility and the extreme remorse that Brian was feeling(Hr.Tr.328-29).

And there was other evidence relevant to counter the State's theory. Not only were there several other men who matched the Y-profile on the swab, two – Sim and Kathcart – owned pickup trucks at the relevant time(Hr.Tr.501; M.Ex.BBB), precisely the kind of vehicle the neighbors heard going to the Bonnies' that night, yet Brian did not drive there himself(Hr.Tr.483-88,495-98;M.Ex.M).

Given that there was evidence that the State suppressed that two peaks consistent with Sarah's husband Ben were found on the vaginal swab, the evidence that specific other men who owned trucks like what was heard at the Bonnies' matched the Y-profile, also suppressed by the State, would have combined to be an effective defense against two of the State's four aggravators. This was material, exculpatory evidence, or at least evidence that might have led the jury to reject those aggravators and pay much less attention to the allegation of rape.

Even if they found them to be proven, that does not end the discussion. As the jury was instructed, there still remained two steps before they could vote for death: weighing the mitigation and aggravating evidence, and ultimately determining the

appropriate punishment(L.F.177,180-81). Had there been evidence of several additional matches, there is a reasonable probability that they would have found the DNA evidence less compelling and therefore less supportive of a verdict of death.

It is noteworthy that the prosecutor here, Ahsens, was the same prosecutor this Court found suppressed relevant impeachment evidence in ***Taylor***.262 S.W.3d at 242-43. Here, he told the jury that Sim was in DOC when he was not, in addition to not informing counsel about the hit on Kathcart that the lab informed the prosecution of before trial. The State should not be rewarded for this pattern of suppressing inconvenient evidence.

As in Point I, the Sixth Amendment guarantee of the assistance of counsel includes the requirement that the assistance of counsel be effective.***Cuyler v. Sullivan***,446 U.S.335(1980). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise the customary skill and diligence reasonably competent counsel would have exercised, and that he was prejudiced.***Strickland v. Washington***,466U.S.668,687(1984). A movant is prejudiced if there is a reasonable probability that but for counsel's errors the result would have been different.***Deck v. State***,68S.W.3d418,426(Mo.banc 2002)(discussing ***Strickland***). A reasonable probability is a probability sufficient to undermine confidence in the outcome.*Id*.426.

Counsel should also have objected when the prosecutor misled the jury by falsely implying in his question of Wyckoff that Sim was incarcerated at the time of the murders(Tr.849-50;Hr.Tr.465; M.Ex.RR). But counsel did nothing to investigate Sim because they wanted nothing to do with the rape allegation(Hr.Tr.697,730). Counsel

failed to do a basic investigation to determine Sim's circumstances, instead sitting idly by while the prosecutor misled the jury. This was not at the level of the customary skill and diligence of reasonably competent counsel.***Strickland***;466 U.S.687;***Rompilla v.Beard***,545 U.S.377,387(2005)(counsel's duty to investigate "should always include efforts to secure information in the possession of the prosecution and law enforcement authorities.").

Counsel should have been aware enough to prevent this improper tactic of falsely implying Sim's incarceration. Their failure to do so, especially combined with the State's suppression of additional evidence of other men matching the profile, prejudiced Brian by giving the State false, incomplete evidence in aggravation. Had counsel investigated Sim and objected to the prosecutor's false implication that he was incarcerated at the time of the murders, it would have rebutted those aggravators.*See also*, ***Ervin v.State***,80S.W.3d 817,827(Mo.banc2002)(counsel has a duty "to neutralize the aggravating circumstances advanced by the state.")

With the evidence of other men who matched the profile, who owned trucks that could have produced the noise the witnesses heard, counsel would have been less likely to turn their backs on the evidence of rape. This violated ***Brady***, and counsel should have objected to the prosecutor's false assertion that the only one of those men – Sim – that the State had deigned to disclose before trial, was incarcerated at the time of the murders, and they should have investigated Sim and learned of the prosecutor's deception. For these reasons, the motion court's findings are clearly erroneous, and this Court should remand for a new penalty trial.

III. Failure to investigate and present evidence of Brian's inability to deliberate and in support of statutory mitigators

The motion court clearly erred in denying Brian's claim that counsel were ineffective for failing to investigate Brian's mental health and present evidence from Drs. Smith and Daniel that at the time of the murders, the combination of Brian's major depression and polysubstance dependence rendered him unable to deliberate, caused him to act under the influence of extreme mental or emotional disturbance, and rendered him unable to appreciate the criminality of his conduct or conform his conduct to the law, denying Brian his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, in that reasonably competent counsel would have discovered and presented this evidence and had Brian known of the evidence before his plea and received competent advice, there is a reasonable probability he would have gone to trial in guilt phase rather than plead guilty. Alternatively, the jury would have found that the mitigating evidence outweighed the State's aggravating evidence, and thus that it would have returned a verdict of life.

Counsel failed to present evidence from Drs. Smith and Daniel that Brian suffered from diminished capacity such that, had he had a guilt phase trial rather than plead guilty, there is a reasonable probability that he would not have been found guilty of first-degree murder. These experts would have testified that Brian suffered

from major depression and polysubstance dependence. Had counsel investigated and obtained this evidence, Brian would have gone to trial rather than plead guilty. At a minimum Dr.Smith's and Dr.Daniel's findings should have been presented as mitigating evidence in penalty phase to support a life sentence.

STANDARD OF REVIEW

This Court reviews Rule 29.15 findings for clear error.***Morrow v.State***, 21 S.W.3d819,822(Mo.banc2000). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. ***Woodson v.North Carolina***,428U.S.280,305(1976);***Lankford v.Idaho***,500U.S.110, 125(1991). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise the customary skill and diligence reasonably competent counsel would have exercised and prejudice.***Strickland v.Washington***,466U.S.668,687(1984). A movant is prejudiced if there is a reasonable probability that but for counsel's errors the result would have been different.***Deck v.State***,68S.W.3d418,426(Mo.banc2002)(discussing ***Strickland***). A reasonable probability is a probability sufficient to undermine confidence in the outcome.*Id*.426.

DR.SMITH

Trial counsel did not inform the jury that Brian's mother had also been treated for depression, that his extended family had a history of alcohol abuse, or that Brian's parents had observed behaviors in his childhood that were indicative of depression(Hr.Tr.68-70). Dr. Robert Smith, a clinical psychologist and addiction specialist retained by trial counsel, was not asked before Brian's guilty plea to

evaluate him for a diminished capacity defense(Hr.Tr.44). Nor did trial counsel retain a psychiatrist in representing Brian(Hr.Tr.591-92).

Dr.Smith interviewed Brian twice before the penalty phase trial – in August 2007 and March 2008(Hr.Tr.21,23,26). He administered three drug and alcohol screening tests at the first meeting(Tr.938;Hr.Tr.23-24). Dr.Smith had not reviewed any records beforehand and they did not speak about Brian's thoughts before and at the time of the murders, or Brian's substance abuse history(Hr.Tr.23-25). Dr.Smith did not receive Brian's records from trial counsel until February 2008, and he did not meet Brian for the second time until after the plea(Hr.Tr.25-27). Before the second meeting, Dr.Smith reviewed Brian's educational and medical records, and the police reports, which confirmed what Brian told him about his history; Dr.Smith found, based on the interviews, test results, and record review, that Brian has suffered from alcohol and drug addiction, along with Major Depression, his entire adult life(Tr.939-45;Hr.Tr.29-32).

Dr.Smith explained that though he told counsel it would be very important to interview Brian's parents, they did not arrange that before trial, nor did he receive Brian's records until after Brian had pleaded guilty(Hr.Tr.26-27,44,47-48). Dr.Smith did not know before trial about Brian's mother's medication for depression, or the extent of Brian's father's alcohol abuse and its resulting contribution to the family's dysfunction(Hr.Tr.49-50).

Dr.Smith learned from Brian's mother, Patty, that she had a history of depression for which she had taken medication(Hr.Tr.50). Brian had not known that, so

Dr.Smith could not testify about it at trial or take its significance into account in forming his opinions about Brian(Hr.Tr.50). Patty also had aunts and uncles who abused alcohol, which was important information because of the genetic component in susceptibility to addiction(Hr.Tr.51).

The most important information Dr.Smith received from Patty was that she had noted signs of depression early in Brian's adolescence – by age 13 or 14(Hr.Tr.51-52). The clear signs of the beginnings of a depressive disorder were not in the records Dr.Smith received – the diagnosis of Brian's depression they contained was as an adult(Hr.Tr.52). Noting the early onset of depression gives a better understanding of Brian and the progression of his symptoms, which predate his use of alcohol and drugs, indicating he was self-medicating his depression(Hr.Tr.52).

Brian's father, Larry, was open about his own alcohol abuse and a family history of substance abuse(Hr.Tr.55). Larry's brother and a family friend confirmed alcohol was an ongoing problem for Larry, and that it caused problems in his relationship with Patty(Hr.Tr.56-57). Brian was exposed to alcohol abuse and family conflict throughout childhood(Hr.Tr.57).

The importance of the information from Brian's family and friends that Dr.Smith did not have before trial was twofold: it provided support for the genetic influences underlying Brian's addiction and a genetic predisposition for depression(Hr.Tr.57-58).

Dr.Smith believed Brian was under an extreme mental or emotional disturbance at the time of the murders due to his major depressive disorder and alcohol and cocaine

dependency(Hr.Tr.59). As he had at trial, Dr.Smith opined that Brian's capacity to conform his conduct to the law was impaired(Hr.Tr.59). Had he been given the opportunity to interview Brian's family and family friends before trial, he would have, and his testimony would have been the same at trial as it was at the post-conviction hearing, if he had had that information(Hr.Tr.59-60).

DR.DANIEL

Trial counsel did not retain a psychiatrist to evaluate Brian before he pleaded guilty(Hr.Tr.591-92). Dr. A.E.Daniel, board certified in forensic psychiatry, evaluated Brian in the post-conviction case(Hr.Tr.220-21,225). Dr.Daniel consulted with Fulton State Hospital and later served as the director of the privatized psychiatric services for the State of Missouri(Hr.Tr.224-25). He reviewed Brian's medical, psychological, and substance abuse treatment records, including about his suicide attempts, his school and DOC records, the criminal investigation and trial records, and a social history prepared by post-conviction counsel's office(Hr.Tr.226-39). Dr.Daniel interviewed Brian on three occasions for two to three hours each time, and he interviewed Brian's parents(Hr.Tr.243-44). Dr.Daniel saw little nurturing and emotional support from either parent(Hr.Tr.251).

Brian's grandparents had a history of alcoholism, and there is a significant correlation between such family history and a high risk for alcohol dependence in subsequent generations(Hr.Tr.252). Brian began using alcohol and drugs in his teens and became addicted to crack cocaine – a heavily addictive substance, causing both psychological and physical dependence(Hr.Tr.256-57,280).

Brian was diagnosed with depression dating back to 1995; he was admitted to psychiatric facilities three times, including twice after suicide attempts(Hr.Tr.259). It was evident Brian suffered from chronic major clinical depression(Hr.Tr.259). With Brian's dual diagnosis of major depression and chemical dependence, the two conditions fed into each other and led to a vicious cycle of self-medicating with cocaine(Hr.Tr.282-83).

Brian told Dr.Daniel that on December 23, 2006, he drank seven to ten beers at the Bonnie home as they played pool in an outbuilding, and his memory is spotty for the events of that time(Hr.Tr.293-94). He planned to spend the night in the outbuilding, but at some point he went in the house looking for alcohol(Hr.Tr.295-96). He found a bottle of vodka and drank a large part of it(Hr.Tr.296). He went back to the outbuilding, feeling suicidal, and found a shotgun and ammunition(Hr.Tr.296-97).

Brian remembered being in the room with Sarah and Ben, but did not remember shooting them(Hr.Tr.297). It is not uncommon to find "patchy" memories in those chronically drug or alcohol dependent with major depression(Hr.Tr.324). When Dr.Daniel was asked about Brian's telling Dr.Smith that he remembered shooting Ben and Sarah, he explained that Brian's statement only seemed inconsistent: although he did not have the capacity to formulate the necessary intent, he felt extreme remorse, and in his very depressed, guilt-ridden state when he spoke to Dr.Smith, his statement may not have been entirely consistent with what actually happened(Hr.Tr.328-31).

Brian had no recollection of having any physical contact with Sarah(Hr.Tr.297-98). He denied ever having a sexual attraction to her(Hr.Tr.300). Dr.Daniel found

that Brian did not meet the criteria for any sexual deviation disorder, in that he had never been sexually abused, had no history of sexual misconduct, and Dr.Daniel's own evaluation showed no sexually deviant interests(Hr.Tr.307-08).

Dr.Daniel believed that at the time of the murders, Brian was severely psychiatrically impaired due to the combined impact of depressive disorder and polysubstance dependence(Hr.Tr.309). As a result, Brian was not able to coolly reflect upon his conduct(Hr.Tr.309). Also, Brian's ability to appreciate the wrongfulness of his conduct was severely compromised or impaired, and he was laboring under an extreme emotional and mental disturbance(Hr.Tr.309-10). The fact that Brian had to reload the shotgun did not mean he had the ability to reflect on the consequences of his actions, which is different from not understanding what would happen(Hr.Tr.325).

COUNSELS' TESTIMONY

The mental health issues and evidence were primarily Slusher's responsibility (Hr.Tr.574-75,700-02,708). Slusher may have spoken to a psychiatrist, but he could not recall for sure(Hr.Tr.591-92). He did not believe he considered bringing in a psychiatrist to examine Brian, and he did not recall seriously considering a guilt phase diminished capacity defense(Hr.Tr.591-92).

Both counsels' strategy in advising Brian to plead guilty was to hope for "credit" from the jury for his accepting responsibility(Hr.Tr.581,709-10). Slusher did not recall specifically discussing diminished capacity with Dr.Smith; he assumed Smith's

evaluation would include diminished capacity, since that could be a mitigating factor, even if not raised as a defense to first-degree murder(Hr.Tr.591,594). Slusher did not usually give mental health experts specific instructions along those lines; he would simply describe the circumstances and ask for a "workup"(Hr.Tr.594-95).

When asked why he did not seek an opinion about diminished capacity, extreme emotional disturbance, or an inability to conform his conduct to the law, Slusher said his process was to get the doctor's report and have discussions about how the findings fit into various legal theories(Hr.Tr.595-96). He did not recall a specific discussion with Dr.Smith about extreme mental or emotional disturbance, but in general he is concerned about raising that issue if there is voluntary drug use, because he feels juries do not care for experts' explanations of the connection between drug use and murder(Hr.Tr.596-97). Although he did not recall, it would not surprise him that he chose not to seek that mitigator, "because we already [had] one and we [had] what we need[ed] to argue."(Hr.Tr.597).

Slusher did not believe he could achieve a verdict of life just on evidence of depression(Hr.Tr.598). He did not recall thinking about whether depression was recognized as a mental disease or defect, and he did not consult a psychiatrist about whether the medical profession considered it as such(Hr.Tr.598-99).

FINDINGS

The motion court found that Dr.Smith discovered three facts that he did not know before trial: that Brian's mother had a history of depression; that some members of

Brian's extended family had histories of substance abuse; and that Brian was depressed before he began using drugs(PCR.L.F.180). The court denied the claim, finding that these facts did not change Dr.Smith's opinions and did not have any mitigating value beyond what Dr.Smith offered at trial(PCR.L.F.180).

The motion court further found that Dr. Daniel established "significant inconsistency in [Brian's] version of events and his ability to remember the crimes."(PCR.L.F.181). It said Brian told Dr.Daniel that he had no recollection of the shootings, yet told Dr.Smith that he remembered standing over the bed and shooting Sarah and Ben(PCR.L.F.181). The court also found that Dr.Daniel opined that Brian "lied" about how happy his childhood had been, and he reported that Brian "denigrated" Ben, calling him an alcoholic.[17] The court further noted that Dr.Daniel did not offer anything significantly different from Dr.Smith's testimony(PCR.L.F.181). Counsel made a "conscious decision" to use Dr.Smith and were not obligated to select any particular expert(PCR.L.F.181).

The motion court called counsels' trial strategy very straightforward: they believed there no reasonable likelihood Brian would avoid a conviction for first-degree murder – a diminished capacity defense was not reasonable under the facts: Brian made a "brief" confession; he had to retrieve the shotgun, then reload it before shooting a second time; he poured bleach on Sarah's body to cover up a rape; and he

[17] Although the court found that Brian denigrated both victims, it pointed to no evidence concerning Sarah.

locked the bedroom door to keep the child, Jade, out of the crime scene(PCR.L.F.181-82). Based on that strategy, it found that a reasonably competent attorney could conclude there was no possibility of avoiding a first-degree conviction, and that the best strategy to avoid a death sentence was to accept full responsibility for the crime and express remorse(PCR.L.F.182).

Counsels' decision to accept responsibility without qualification or exception was also reasonable because they did not want Brian to take full responsibility, then appear to be doing the opposite(PCR.L.F.182). The court finally noted that the best evidence of the effectiveness of counsels' strategy was the cross-examination of Brian, in which the State did not "score any points" – the examination was short, and was not damaging; Brian's expressing responsibility and remorse "blunted any real attacks the State could make on [Brian]."(PCR.L.F.182).

The court viewed the following evidence as making the overall strategy of taking responsibility to avoid a death sentence reasonable: Brian waited until everyone else left; he had to retrieve the shotgun to use it; he had to load and reload it; he locked the bedroom door afterward to keep the couples' child, Jade, out of the bedroom; he had the presence of mind to steal property for resale; he tried to cover up the crime by pouring bleach on Sarah; and he turned himself in, telling officers that he was the right person to speak to about what had happened to Ben and Sara(PCR.L.F.184).

The court found that given the strength of that evidence, and the fact that Dr.Smith testified at trial about Brian's mental health history and substance abuse, and explained how the two conditions form a dual diagnosis for which Brian had been

treated with little success, counsel not unreasonably concluded there was little chance of arguing diminished capacity – the court said neither Dr.Smith nor Dr.Daniel would have offered any significant additional evidence to support that defense(PCR.L.F. 184). Further, Drs. Smith and Daniel reported inconsistent statements from Brian about his recollection of the crime, and the court believed the jury would have found that discrepancy significant(PCR.L.F.184-85).

The court concluded the doctors' "assertions that [Brian's] depression triggered this criminal activity were unpersuasive. They would not have been effect[ive] in convincing a jury that [Brian's] actions were based on an inability to 'coolly reflect' on what he was doing."(PCR.L.F.185). The court said that even if that possibility existed, "counsel cannot be faulted for concluding such a result was very unlikely and that accepting responsibility was the best course of conduct."(PCR.L.F.185).

COUNSEL WERE INEFFECTIVE

The failure of trial counsel Slusher and McBride to do a reasonable investigation of Brian's mental health and his mental state at the time of the crimes led to: guilty pleas that were not knowing and voluntary; a lack of evidentiary support for a statutory mitigator of which counsel gave notice but did not submit, as well as the mitigator they did submit; and a lack of mitigating evidence that Brian's depression and addictions were a recognized medical condition.

Diminished capacity generally.

Evidence that a defendant suffered from a mental disease or defect is admissible to prove that he did not have a state of mind that is an element of the offense.*See* ***State v.Walkup***,220 S.W.3d748,754(Mo.banc2007), relying on §552.015.2(8). This is the defense of diminished capacity. *Id.*754. In recognizing the diminished capacity defense, this Court has defined it as "proof of mental derangement short of insanity as evidence of lack of deliberate or premeditated design. In other words, it contemplates full responsibility, not partial, but only for the crime actually committed."*Id.*,*quoting* ***State v.Anderson***,515S.W.2d534,540(Mo.banc1974). Deliberation is the mental state that distinguishes first- and second-degree murder.§§565.002(3),565.020,565.021.

Counsel who fail to present evidence of diminished mental abilities are ineffective. *See* ***Williams v.Taylor***,529U.S.362,396(2000)(counsel failed to present evidence defendant was borderline mentally retarded and did not go beyond sixth grade); ***Wiggins v.Smith***,539U.S.510,535(2003)(counsel failed to present evidence of defendant's homelessness and diminished mental capacities);***Rompilla v.Beard***,545 U.S.374,391(2005)(even though counsel retained three mental health professionals they failed to present mental health evidence that included test scores showing a third grade achievement level after nine years of schooling).

Failure to advise Brian about a possible diminished capacity defense.

To be valid and binding, a guilty plea must be entered voluntarily and intelligently.***Boykin v.Alabama***, 395U.S.238,242(1969). The questions are whether

the plea was "an intelligent act done with sufficient awareness of the relevant circumstances and likely consequences,"***McMann v.Richardson***,397 U.S. 759,766(1970); and "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant."***Hill v.Lockhart***,474 U.S.52,56(1985). Because counsel did not advise Brian that he had a legitimate diminished capacity defense, Brian's pleas could not have been entered with sufficient awareness of his circumstances: That two mental health professionals – Dr.Smith, a clinical psychologist and certified addiction specialist, and Dr.Daniel, a board-certified forensic psychiatrist who worked for the State of Missouri for almost 15 years and the State Director of Psychiatric Services for eight – believed that Brian was *not* capable of cool reflection, i.e., he was not capable of deliberation, and thus was not guilty of first-degree murder(Hr.Tr.17,44,221,224-25,309).

While trial counsel are able to make reasonable strategy decisions, they may not do so in the absence of a reasonable investigation. In ***Rompilla v.Beard***,545 U.S.377, 387(2005), in holding that a lawyer "is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial[,]" the Supreme Court, quoting 1 ABA Standards for Criminal Justice 4-4.1(2d ed.1982 Supp.), noted that it is the lawyer's duty "to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction."(emphasis added).

The motion court seriously confused the issues of making a reasonable strategy decision after reviewing all available facts and making decisions without taking steps to learn those facts. The former is accorded great deference; the latter is constitutionally ineffective. *See*, ***Kenley v.Armontrout***,937F.2d1298,1304(8th Cir. 1991)(failing to interview witnesses relates to preparation, not strategy). Lack of diligent investigation is not protected by a presumption in favor of counsel and cannot be justified as strategy. *Id*.1304. Counsel did not interview Dr.Smith about a diminished capacity defense, but instead relied on him strictly as a penalty phase witness. Counsel, likewise, did not interview a psychiatrist such as Dr.Daniel about such a defense, and Slusher did not recall seriously considering a guilt phase diminished capacity defense(Hr.Tr.591-92). This failure was not diligent investigation and cannot be legitimated as strategy. *See* ***Kenley***.

Counsel's strategy must be objectively reasonable and sound. ***State v.McCarter***, 883S.W.2d75,78(Mo.App.S.D.1994). In ***Hutchison v.State***,150S.W.3d 292,304-05(Mo.banc2004), although counsel called a psychologist and Hutchison's mother to testify about his learning disability and special education, counsel was ineffective for failing to investigate and present records and additional expert testimony. Brian's counsels' strategy was to have him take responsibility and ask the jury for mercy, without having first taken steps to ascertain whether he in reality <u>was</u> responsible, at least to the extent of the responsibility required for a first-degree murder conviction.

This was not a reasonable strategy because counsel did not even set out the parameters of Dr.Smith's evaluation before advising Brian to plead guilty – Slusher

simply *assumed* that Dr.Smith would do a complete "workup"(Hr.Tr.593-94). Slusher admitted that he would only have discussions about mitigators in later conversations; he would not direct Dr.Smith to evaluate any specific mental health issue(Hr.Tr.595).

But the problem with that approach is that Slusher discussed Dr.Smith's first interview of Brian, in August 2007, immediately thereafter(Hr.Tr.23,26). Therefore, Slusher knew at that point – more than six months before the pleas – that Dr.Smith did not even broach the subject of the murders at that first meeting(Hr.Tr.25). Nor had Slusher provided any records to Dr.Smith at that point(Hr.Tr.24). It was therefore impossible for Dr.Smith to evaluate Brian's mental status at the time of the crime; he had no basis to do so. Dr.Smith did not talk to Brian about what happened until after Brian had pled guilty(Hr.Tr.26-27). This "strategy" was not a strategy at all; at least it was not objectively reasonable and sound.*See* ***McCarter***.

Because counsel had not conducted a proper investigation, they could not provide Brian with sound legal advice as to this options, the possibilities of a conviction, or, indeed, the possibility of a conviction of a lesser offense. His pleas were by definition without *any*, let alone a *sufficient*, "awareness of the relevant circumstances and likely consequences."***McMann v.Richardson***,*supra*. Nor could either Brian or counsel know "whether the plea represent[ed] a voluntary and intelligent choice among the alternative courses of action open to [Brian]."***Hill v.Lockhart***,*supra*.

The finding that Drs. Smith and Daniel "would not have been effect[ive] in convincing a jury that [Brian's] actions were based on an inability to 'coolly reflect'

on what he was doing"(PCR.L.F.185), is clearly erroneous. A state post-conviction judge's findings that a witness in the proceeding is not convincing does not defeat a claim of prejudice.***Kyles v.Whitley***,514U.S.419,449,n.19(1995). Such an observation could not substitute for the jury's appraisal at the time of trial.*Id*. Credibility of a witness is for the jury, not the post-conviction court.***Antwine v.Delo***,54F.3d1357, 1365(8thCir.1995). Further, the motion court again showed its lack of understanding of the issues. The question as to diminished capacity was not one of *additional* evidence – there was no such defense presented at trial. Therefore, *everything* offered by Drs. Smith and Daniel was *new* evidence on the subject. In fact, when Dr.Smith mentioned diminished capacity at trial, when asked during cross-examination whether Brian knew right from wrong, the prosecutor jumped, saying, "That's not in your report anywhere. You're just saying his reasoning is affected by drugs. That term has a legal meaning, Doctor, and I don't think you want to say that."(Tr.971). Therefore at trial the State took the position that there was no evidence of diminished capacity, nor did Dr.Smith evaluate Brian for that defense. To now hold that Drs. Smith and Daniel's evidentiary hearing testimony was without value belies the record.

Even less supported by the record is the court's finding that the doctors "asserted" that Brian's depression "triggered" his criminal activity(PCR.L.F.185). It is not surprising that such "assertions" would be unpersuasive, because there were no such assertions. Neither Dr.Smith nor Dr.Daniel said Brian's depression "triggered" his conduct; both said only that he lacked the ability to coolly reflect, and his judgment was impaired; both said he could make decisions, but his decision-making was

impaired(Hr.Tr.79-80,324-25). Dr.Smith specifically denied that Brian met the criteria for an "NGRI" defense(Hr.Tr.80).

Failure to present evidence supporting statutory mitigators.

"Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances."***Tennard v.Dretke***, 542U.S.274,285(2004)(quoted in ***Hutchison***,150S.W.3d 304, and ***Glass v.State***, 227S.W.3d463,468(Mo.banc2007)). Relevant mitigating evidence "is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value."***Tennard***,542U.S. 284.

In ***Wiggins v.Smith***, the Court found counsel's failure to conduct a thorough investigation that would have uncovered evidence of physical and sexual abuse reflected only a partial mitigation case.539U.S.524-26,534-35. That partial case was the result of inattention, not reasoned strategic judgment and constituted ineffective assistance. *Id*. In finding Wiggins's counsel was ineffective the Court observed:

> Petitioner thus has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability.***Penry v.Lynaugh***,492 U.S.302,319 ... (1989)("'[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background ... may be less culpable than defendants who have no such excuse'").

Id.535.

Wiggins reasoned that if the jury had been able to place Wiggin's "excruciating life history" on the mitigating side of the scale there was a reasonable probability a different balance would have been struck.*Id*.537. The mitigating evidence that could have been presented might have influenced the jury's appraisal of Wiggins' moral culpability.*Id*.538.

In ***Williams v.Taylor***, trial counsel presented mitigating evidence through the defendant's mother, his friends, and a psychiatrist, but failed to conduct an investigation that would have uncovered extensive evidence of his abusive and deprived childhood. 529U.S.369,395. Similarly, Williams was denied effective assistance under ***Strickland***.*Id*.396-98. And in ***Rompilla v.Beard***, counsel was ineffective in failing to uncover and present evidence of a mental disorder. 545U.S.390-93.

The motion court's finding that Dr.Smith discovered three facts that he did not know before trial(PCR.L.F.180), is similarly clearly erroneous because the claim is of the failure to conduct an adequate investigation, not simply adding a modicum of evidence to Dr.Smith's trial testimony(PCR.L.F.60-65). Also contained in Brian's claim is that trial counsel failed to present evidence to support submitting the statutory mitigator in §565.032.3(2): that Brian acted under the influence of extreme mental or emotional disturbance, as well as the additional evidence in support of the mitigator under §565.032.3(6) that was submitted: Brian's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law(PCR.L.F.63).

As noted above, it was not for the post-conviction court to determine what a jury would consider or what weight it would give evidence offered in mitigation.***Kyles v.Whitley***,514 U.S.449,n.19;***Antwine v.Delo***,54 F.3d 1365. The new evidence, undiscovered by trial counsel – that Brian's mother had a history of depression; that some members of Brian's extended family had histories of substance abuse; and that Brian was depressed before he began using drugs(PCR.L.F.180) – was all considered important by Dr.Smith(Hr.Tr.47-48,50,58), whose opinions and credibility were the bulk of the mitigation offered at trial.

Dr.Smith told Slusher after his first session with Brian that it would be very important to interview Brian's parents, but Slusher never arranged it(Hr.Tr.47-48). When given that opportunity in the post-conviction case, Dr.Smith found out about Patty Dorsey's history of depression, the extent of Larry Dorsey's alcohol abuse and the dysfunction it created in the family, the history of substance abuse on both sides of the family, and the parents' account of Brian's childhood symptoms that did not show up in the records Dr.Smith received from Slusher, all showed a genetic component to Brian's own depression and substance abuse(Hr.Tr.49-52,54-58).

This combination of the two disorders, both with genetic components, coupled with environmental stressors, such as Larry's drinking and Brian's inability to fulfill his dream of playing college football add up to depression and Brian's turning to drugs as a way to self-medicate or treat the depression(Hr.Tr.57-58,272). Those factors allowed Dr.Smith to form the opinion that Brian was suffering an extreme mental or emotional disturbance at the time of the murders, and maintained his

opinion that Brian lacked the capacity to conform his conduct to the requirements of the law(Hr.Tr.59).

This evidence Dr.Smith provided did not lack mitigating value(PCR.L.F.180). There is a reasonable probability that the jury would have found, based on this evidence that trial counsel did not even seek, that the genetic component of Brian's depression and dependency on cocaine and alcohol made the effect of those disorders more understandable and more intuitively reasonable, than simply Dr.Smith's trial testimony, largely based on what Brian told him – on which the State sought to impeach Dr.Smith at trial(Tr.962).

Wiggins, ***Williams***, and ***Rompilla*** all recognized the inherent mitigating value of evidence of a defendant's mental health history. The background information that Dr.Smith was able to provide after conducting the complete, reasonable investigation that trial counsel did not ask him to perform linked Brian's depression and substance abuse and addiction to genetic factors of which Dr.Smith was unaware at the time of trial, thus allowing him to present a richer picture of the turmoil of Brian's life, which would have served to mitigate his conduct. Reasonable counsel would have had Dr.Smith conduct that complete background investigation that he did in the post-conviction case. Brian was prejudiced because there is a reasonable probability he would have been sentenced to life had the jury heard this evidence.*See* ***Strickland*** and ***Deck***.

Failure to present mitigation evidence through a psychiatrist.

Brian first notes that the motion court's finding that Dr.Daniel offered an opinion that Brian "lied" about whether his childhood was happy or not(PCR.L.F.181), is contrary to the testimony. Dr.Daniel testified that Brian described his family as "happy"(Hr.Tr.277). He then explained that as Dr.Daniel explored the family dynamics, he found that Brian's description was not consistent with the other information Dr.Daniel gathered(Hr.Tr.277). Contrary to the court's finding, Dr.Daniel said this inconsistency was significant because it meant that Brian was not perceiving things as he should, and that he probably lived in a world of fantasy belief at the time(Hr.Tr.278). This is the polar opposite of a "lie;" it is actually further evidence of Brian's serious mental illness of a long-standing nature.

Also taken out of context is the motion court's finding that Dr.Daniel established a "significant" inconsistency in Brian's statements about whether he remembered doing the shootings(PCR.L.F.181). Again, this was significant, but it was significantly favorable to Brian. Dr.Daniel explained that the differing statements – telling Dr.Smith that he remembered the shooting while telling Dr.Daniel that he did not – could be reconciled in the fact that Brian accepted responsibility for having killed, and he felt extreme remorse(Hr.Tr.329-30). The admission to Dr.Smith was from a person who did something for which he did not have the capacity to formulate the intent to do, but looking at the entire story, he felt extremely guilty for having done it, and his admission probably came from reflecting on his guilt and may not be entirely consistent with what actually happened(Hr.Tr.330-31). It was not a question of

honesty but of being overtaken with guilt and remorse(Hr.Tr.331). Dr.Daniel could understand that Brian was in a very depressed, guilt-ridden state in 2007 and 2008, when the statement was made, and his statement probably reflected his mental state at that point(Hr.Tr.331).

Much of Dr.Daniel's testimony on the subject of diminished capacity is relevant to statutory mitigating circumstances, which under §565.032.3 shall include:

> (2) The murder in the first-degree was committed while the defendant was under the influence of extreme mental or emotional disturbance;
>
> * * *
>
> (6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired[.]

Trial counsel gave notice of intent to submit these two mitigators, but ultimately submitted only Sub(6) as to both counts(L.F.155,177,180).

The prejudice to Brian in failing to call Dr.Daniel is underscored by the statutory mitigating circumstances that his testimony would have supported – both the submitted Sub(6) and the omitted Sub(2).

Both Dr.Smith and Dr.Daniel testified that because of Brian's major depression and cocaine and alcohol dependency, he acted under the influence of extreme mental or emotional disturbance and he lacked the capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law(Hr.Tr.59,309-10). Because trial counsel did not have a psychiatrist – a medical doctor – evaluate Brian,

the jury did not hear that his major depression was a psychiatric diagnosis(Hr.Tr.308-09).

As noted above, in ***Hutchison v.State***, this Court concluded counsel was ineffective for failing to present a thorough comprehensive expert presentation, despite counsel's having called a psychologist and Hutchison's mother to testify about his learning disability and special education, counsel was ineffective for failing to investigate and present records and additional expert testimony.150S.W.3d at 307.

Counsel was on notice that Brian's conditions were medical in nature: counsel had obtained and reviewed Brian's medical records from Drs. Moline and Lyskowski(Hr.Tr.576,592). Thus there was no reason not to present psychiatric/medical evidence that Brian suffered from major depression and polysubstance dependence(Hr.Tr.308-09).

Similarly, in ***Glass v.State***, counsel was ineffective for failing to call multiple expert witnesses who could have provided mitigating evidence.227S.W.3d at 470-71. Counsel was ineffective for failing to call a neuropsychologist, who had evaluated Glass before trial, and found Glass had brain impairment that caused him to have difficulty with learning, memory, and impulse control.*Id*.470. The failure was prejudicial because the psychological evidence had powerful inherently mitigating value and was especially prejudicial because the jury heard no penalty phase experts. *Id*. Counsel was also ineffective for failing to call a toxicology pharmacologist, who would have provided a powerful basis to support the statutory mitigating circumstances of substantial impairment and extreme emotional distress under

§565.032.3(2) and (6).*Id*.471. Additionally, counsel was ineffective for failing to call a learning disability expert, who identified Glass' learning deficits.*Id*.471. The failure was prejudicial because evidence of impaired intellectual functioning is mitigating evidence regardless of whether a defendant has established a nexus between his mental capacity and the crime.*Id*.470-71.*See also*,***Hutchison***,150 S.W.3d 305(same) (relying on ***Tennard***,524U.S.289).

When counsel failed to call Dr.Daniel to testify that Brian suffered from major depression and polysubstance dependence, counsel failed to make a thorough and comprehensive expert presentation.*See* ***Hutchison*** and ***Glass***. In deciding prejudice from failing to present mitigating evidence, courts are required to evaluate the totality of the evidence.***Hutchison***150S.W.3d 306(relying on ***Wiggins***,539U.S.536). "The question is whether, when all the mitigation evidence is added together, is there[*sic*] a reasonable probability that the outcome would have been different?"***Hutchison***,150S.W.3d 306. Brian was prejudiced because the jury was not provided significant evidence to support the two statutory mitigators – that he acted under the influence of extreme mental or emotional disturbance and he lacked the capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law. There is a reasonable probability that at a minimum had Dr.Daniel presented evidence about Brian's conditions, he would have been sentenced to life.

For all the reasons discussed, counsels' failure to call Dr.Daniel to testify about Brian's major depression coupled with the evidence of his dependence on alcohol and

cocaine denied him effective assistance of counsel and a new penalty phase is required.

The motion court's judgment was clearly erroneous finding that trial counsel employed reasonable strategy in failing to investigate the defense of diminished capacity before Brian's guilty plea, making those pleas unknowing and involuntary, and they should be vacated. The judgment is also clearly erroneous in finding that the mitigating evidence that trial counsel failed to discover due to an inadequate investigation would not have had any mitigating value, and that counsel reasonably chose not to investigate and present mitigating evidence from a psychiatrist who could explain Brian's mental health condition. Brian is entitled to a new sentencing trial.

This Court should reverse for a trial on guilt or at a minimum for a new penalty hearing.

IV. Failure to present medical witnesses and records concerning Brian's treatment for depression and suicide attempts

The motion court clearly erred in denying Brian's claim that counsel were ineffective for failing to present in mitigation testimony and records from Drs. Moline and Lyskowski concerning Brian's treatment for depression, substance dependency, and suicide attempts, denying Brian his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, in that the doctors would have testified that Brian suffered from major depression and substance dependency long before the time of the murders, and reasonably competent counsel would have obtained and presented this evidence to counter the evidence presented in aggravation; had they done so there is a reasonable probability the jury would have returned a verdict of life.

Counsel failed to do a complete investigation and present mitigation evidence of Brian's background, including his treatment for depression, substance dependency, and suicide attempts.

The claim.

Brian claimed that Drs.John Lyskowski and Girard Moline treated him for his depression and substance dependency beginning in 2004 and continuing through suicide attempts and psychiatric admissions in 2005, and had counsel not been ineffective by failing to present their testimony and the records of their treatment,

there is a reasonable probability that he would not have been sentenced to death(PCR.L.F.73-83).

Trial evidence.

Trial counsel retained Dr. Robert Smith to evaluate whether Brian showed evidence of mental illness or abused alcohol or drugs(Tr.936). Dr.Smith testified to meeting with Brian and administering substance abuse screening tests(Tr.937-38). He also spoke in general terms about: 1) reviewing Brian's "records," without specifying what records(Tr.941-44);[18] 2) Brian's diagnosis of and treatment for major depression through antidepressant drugs(Tr.942-45); and 3) his drug and alcohol dependency(Tr.941,945).

Post-conviction evidence.

In contrast to Dr.Smith's general discussion of the records and what Brian told him, post-conviction counsel presented evidence from the treating physicians themselves about Brian's treatment for depression beginning in 2003, and his chemical dependency and suicide attempts(Hr.Tr.121,139).

In October 2003 Brian sought treatment from Dr. Gerald Moline, complaining of depression and insomnia(Hr.Tr.120-21). Dr.Moline started Brian on Zoloft for anxiety and depression, and Ambien for sleep(Hr.Tr.123). When Brian returned after

[18] Although Dr.Smith testified at trial that his report – admitted at trial as Ex.A and in the post-conviction hearing as M.Ex.Q – listed the records he reviewed(Tr.944), they are not actually listed.M.Ex.Q, p.2.

he ran out of medication, he said they were not working well, and Dr.Moline switched him to a more powerful medication and put Brian on Klonopin for anxiety(Hr.Tr.124-25). Dr.Moline treated Brian until early 2005(Hr.Tr.129). He was not contacted by trial counsel, but he would have been willing to testify at trial had he been called(Hr.Tr.128,133).

John Lyskowski, board-certified in adult psychiatry, now works for the Missouri Department of Mental Health(Hr.Tr.136-37). Brian became Dr.Lyskowski's patient on December11, 2005, at St. Mary's Health Center in Jefferson City, when he was admitted to the hospital through the emergency room with very specific suicidal thoughts of hanging or cutting himself(Hr.Tr.138-39,144). Such specific thoughts are more severe than general thoughts about killing oneself, which are in turn more severe than thoughts such as, "I wish I were dead."(Hr.Tr.144-45).

At the time of his admission, Brian was already taking the maximum dosage of the antidepressant Lexapro, along with another antidepressant, Wellbutrin, and a sleep aid, Desyrel(Hr.Tr.140). He was on double antidepressants to treat severe depression(Hr.Tr.140). Dr.Lyskowski diagnosed major depression, admitted Brian to the hospital, continued the double antidepressants and placed him on suicide watch(Hr.Tr.140,147-48). Dr.Lyskowski raised his Wellbutrin to the maximum dose, changed his antidepressant, and added Klonopin for anxiety(Hr.Tr.148). It was apparent that his present medication was not working(Hr.Tr.153-54). Brian was given psychological treatment consisting of advice about interventions, occupational therapy, social services, and group therapies(Hr.Tr.148).

Brian left the hospital after six days, only to return four days later after cutting his wrist(Hr.Tr.149). He was readmitted to the psychiatric ward(Hr.Tr.149). Dr.Lyskowski said the need for sutures and the fact that Brian cut an artery meant the suicide attempt was serious(Hr.Tr.150,162). It became clear to Dr.Lyskowski by the second admission that Brian was abusing cocaine heavily(Hr.Tr.155). People prone to anxiety – for which Dr.Lyskowski also treated Brian – who use cocaine would have worsening anxiety, and can become paranoid and delusional long term(Hr.Tr.155). Dr.Lyskowski testified that Brian left the hospital with ongoing appointments scheduled with a psychiatrist and a counselor at a mental health center, though he did not know whether Brian followed through(Hr.Tr.152). His records showed he saw Dr. Javed Choudry at Pathways Community Behavioral Healthcare on January 5, 2006(M.Ex.F,9-10).

Trial counsel Slusher, as the attorney who primarily dealt with Brian's mental health issues, testified that he did not know why he did not contact Dr.Lyskowski as Brian's treating psychiatrist(Hr.Tr.603). When asked if that meant that he did not have a reason or did not recall one, he responded that he thought his "intent was probably to have Dr.Smith cover such things," and he "assume[d] that we had Dr.Smith testify about such things as suicide attempts and major depressive disorder."(Hr.Tr.604).

The findings.

The motion court found that the evidence of Brian's mental health and treatment

came in through Dr.Smith's testimony about Brian's records and testimony from Kimberly Luebbering that Brian had attempted to slit his wrists, and that it was a matter of trial strategy how to present that evidence(PCR.L.F.185-86). The court said that counsel Slusher testified that it was his preference to present the evidence through Dr.Smith, and that there were risks in presenting "these witnesses."(PCR.L.F.185). The court was "not convinced that the outcome of the trial would have been different if the jury had heard from" Drs. Moline and Lyskowski, nor did it "believe presenting the actual records would have altered the outcome in this case."(PCR.L.F.186).

Standard of review.

This Court reviews for clear error. ***Morrow v.State***,21 S.W.3d 819,822 (Mo.banc2000); Rule29.15(k). Findings are clearly erroneous if, after reviewing the entire record, this Court has the definite and firm impression that a mistake has been made.***State v.Taylor***,929S.W.2d 209(Mo.banc1996). Ineffectiveness claims are reviewed under ***Strickland v.Washington***,466U.S.668,687 (1984);***Williams v.Taylor***,529 U.S. 362,390-91(2000). ***Strickland's*** prejudice prong is satisfied when there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different.*Id*.;***State v.Butler***,951S.W.2d 600,608(Mo.banc1997). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death.***Woodson v.North Carolina***,428U.S. 280,305(1976);***Lankford v.Idaho***,500U.S.110,125(1991).

The Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering, as a mitigating circumstance, any aspect of defendant's character or background that he proffers as a basis for a sentence less than death. ***Lockett v.Ohio***,438 U.S.586,604(1978). Defense counsel in a death penalty case is obligated to discover and present all substantial, available mitigating evidence. ***Wiggins v.Taylor***,539U.S.510,524(2003);***Kenley v.Armontrout***,937F.2d1298,1307-09(8th Cir.1991).

Discussion.

Drs. Moline and Lyskowski both treated Brian's mental health issues, and could have testified in penalty phase to that treatment and the impact of Brian's mental illness on his behavior. Contrary to the motion court's findings, Slusher did *not* testify that he preferred to bring in the information about the suicide attempts through Dr.Smith(PCR.L.F.185). In fact, Slusher did not even know why he did not contact Dr.Lyskowski as Brian's treating psychiatrist(Hr.Tr.603). When asked if that meant that he did not have a reason or did not recall one, he responded that he thought his intent was "probably" to have Dr.Smith testify to such things as suicide attempts and major depressive disorder; he *assumed* – incorrectly – that Dr.Smith did so testify(Hr.Tr.604).

The motion court's finding that Slusher testified that in his experience there are risks associated with bringing in "these witnesses"(PCR.L.F.185) is also contrary to the record. Slusher only mentioned such "danger" in admitting records and simply

giving them to the jury(Hr.Tr.601).[19] He said no such thing about bringing in treating physicians. Also divorced from the reality of the evidence is the motion court's finding that Slusher elicited testimony from Kimberly Luebbering that Brian had attempted to slit his wrists(PCR.L.F.185-86). Luebbering was Brian's parole officer(Tr.785), and she was *asked* whether he was hospitalized because he tried to slit his wrists, but she answered that she did not know what he had done(Tr.790). So that evidence was not before the jury from Luebbering.

Nor was it before the jury from Dr.Smith. While an expert can rely on hearsay information in forming an opinion, the sources of that information are not substantive evidence; they serve only as a background for the opinion.***Whitnell v.State***,129 S.W.3d 409,416(Mo.App.E.D.2004). Therefore, while Dr.Smith based his opinions of Brian's mental health on the fact of his suicide attempts, trial counsel never presented substantive evidence of Brian's treatment for those attempts to the jury.

This was not, despite the motion court's categorization, a case where trial counsel presented the same information in another form, or chose one witness over another, which could have acted to insulate counsel from a claim of ineffectiveness.*See*, ***Johnson v.State***,388 S.W.3d 159,166(Mo.banc2012)("The choice of witnesses is ordinarily a matter of trial strategy and will not support an ineffective assistance of

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[19] Slusher's explanation for his fear was that it sometimes gave the State "things to use" and he has run into problems in the past(Hr.Tr.601). He could not recall anything specific in the records that might harm Brian's case(Hr.Tr.601-02).

counsel claim."(citation omitted). Rather, counsel not only did not even speak to Brian's treating physicians, but could not give a single reason for the failure to investigate an obvious source of mitigation.

Brian's case is instead governed by the requirement to investigate and present all substantial, available mitigating evidence.***Wiggins v.Taylor***,539U.S.524. Brian's treating physicians, who treated him for depression and polysubstance dependency – Dr.Lyskowski treating him for two suicide attempts – could have provided such substantial mitigating evidence, and counsel had a duty to call them as witnesses and present their records. As Brian's treating physicians, treating him for severe depression, polysubstance dependency, and multiple suicide attempts long before the murders, Drs.Moline and Lyskowski would have had credibility before the jury that a retained, litigation-driven expert would not. They should have been contacted, and they should have testified.

For these reasons, the judgment is clearly erroneous in finding that trial counsel reasonably chose not to investigate and present mitigating evidence from Brian's treating physician and psychiatrist, and he is entitled to a new sentencing trial.

V. Failure to object to "junk science" or to counter it.

The motion court clearly erred in denying Brian's claim that counsel were ineffective for failing to object to the State's evidence in support of its theory that Brian poured bleach on Sarah to cover up his alleged rape of her, or in investigating and presenting evidence to refute the State's evidence, denying Brian his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII,XIV, in that reasonably competent counsel would have: 1) objected and requested a *Frye* hearing, because there was no foundation for Det.Nichols's testimony that an "alternative light source" revealed the presence of a "pour pattern" of bleach on Sarah, or for Wyckoff's testimony that the lab had conducted studies about "chemical insults" to prevent detection of the protein present in semen; or 2) would have presented evidence that other substances –such as beer, which was present at the scene in large amounts – also fluoresce under a similar light source. Had counsel requested a *Frye* hearing and objected to the State's evidence or countered it, there is a reasonable probability the jury would not have found the aggravators involving rape and would not have imposed death.

The motion court fundamentally misunderstood the law applicable to Brian's claim. It denied his claim that counsel failed to request a ***Frye***[20] hearing and object to the State's evidence that lacked a proper foundation yet made it appear that Brian very

[20] ***Frye v. United States***,293 F.1013(D.C.Cir.1923).

calculatedly tried to destroy evidence that he had raped Sarah(PCR.L.F.177-79). But it did so on the basis that Brian had failed to present evidence to "suggest that Det.Nichols'[sic] determination that a pour pattern appeared on the torso of Sarah Bonnie was inaccurate."(PCR.L.F.177). That was not his claim; rather, it was that counsel failed to require that the State provide a foundation for Nichols's testimony.

Trial evidence.

Detective Nichols saw what he believed was a pattern where some liquid had been poured on Sarah's groin or genital area(Tr.676,686). His theory was that bleach had been poured on her, based on the smell of bleach in the bedroom, especially on the side of the bed where Sarah's body lay, the bleached-out appearance of a portion of the bedroom rug, and the presence of a bottle of bleach in the bathroom adjacent to the bedroom(Tr.673-76). He cut out a piece of the carpet for testing, but never heard back from the lab(Tr.673-74). Using an alternative light source, Nichols photographed at the scene and at the autopsy the portion of Sarah's body where he believed he saw pour marks(Tr.676,679,686;St.Ex.33,34).

The State made it clear that it was not talking simply about "pour marks" and the *smell* of bleach – it presented it as *fact* that Brian poured bleach on Sarah's body. It elicited from Nichols what he did other than taking photographs and a sample of the carpet "at the scene that related to this bleach investigation": He "utilized an alternative light source in order to enhance or actually to look for fluids or trace evidence, anything that would not be visible to the naked eye. And on the mid-

section of the female victim, I observed what appeared to be a pour pattern. And I photographed that pour pattern."(Tr.676). Thus Det.Nichols told the jury that what he photographed in the alternative light was pour marks made by bleach. The State also elicited from Jason Wyckoff that the MSHP lab had conducted in-house studies and determined that "chemical insults" such as cleaners could prevent the detection of the protein in semen he tested for(Tr.840-41), thus leaving another implication hanging that Brian poured bleach on Sarah, causing the lab to be unable to confirm the presence of semen. Counsel did not object to either witness's testimony, nor did they request a ***Frye*** hearing to determine whether Nichols's testimony was scientifically founded, and similarly, whether the lab's studies were peer-reviewed and generally accepted.

Post-conviction evidence.

Joseph Johnson, an assistant professor who teaches photography at the University of Missouri, reviewed the alternative-light photography(Hr.Tr.164-69). Professor Johnson reviewed St.Ex.33 and 34, autopsy photographs of Sarah, which were also admitted at the hearing as M.Ex.T and U(Hr.Tr.169-70). Certain substances can be made to fluoresce using other than standard lighting and/or filters or media – whether film or digital media – that is sensitive to light at other wavelengths than the visible spectrum(Hr.Tr.169-70).

Johnson was asked to see whether he could duplicate the look of the marks on Sarah's body(Hr.Tr.170-71). An object or substance can be invisible under ordinary

room light and visible under an alternative light source(Hr.Tr.180). He obtained information about the light Nichols used and the conditions under which he used it; he obtained a similar light and information from the manufacturer as to how to make the light perform identically to the officer's light(Hr.Tr.171-73,185-86). Because of the beer present in photographs of the scene, Johnson ran a test – he poured beer on a model's arm and bleach on her other arm; he then took photographs at intervals over an extended period of time(Hr.Tr.178,182). He determined that beer and bleach fluoresce very similarly(Hr.Tr.195-96,210-11).

Trial counsel Slusher did not know why he did not object to Nichols's testimony for not showing any special training in recognizing substances and their appearance on the human body under alternative light sources, or for a lack of foundation for the scientific evidence(Hr.Tr.612-13). He did not recall considering whether to challenge the State's theory that Brian was sufficiently cognizant of having committed murder that he tried to cover up raping Sarah(Hr.Tr.611). He also did not recall wondering, having seen photographs showing the presence of beer, whether substances other than bleach would fluoresce under an alternate light source(Hr.Tr.614-15). Slusher had no strategy reason for not contesting the issue whether bleach was used(Hr.Tr.637). He said the rape allegation was unquestionably damaging and they needed to fight it if they could have done so effectively, but he did not think they had such a way(Hr.Tr.657).

McBride did not think he knew before trial that substances other than bleach would fluoresce under an alternate light source(Hr.Tr.739). He did not investigate the

matter, and he did not recall that the lab could not determine that bleach had been poured on Sarah or on the carpet(Hr.Tr.739). He did not know that he would have wanted to investigate, because his recollection of the photos was that it looked like something had been poured(Hr.Tr.740-41). When he considered that none of the reports in the case gave any indication when the substance might have been poured on her, or whether it was something that she might have applied herself in the shower or at bedtime, McBride said that the subject of whether other substances fluoresce could have been investigated(Hr.Tr.742).

The findings.

The motion court found that Brian "offered no evidence whatsoever to suggest that Det.Nichols'[s] determination that a pour pattern appeared on the torso of Sarah Bonnie was inaccurate. Instead, [Brian's] argument and evidence at trial[21] consisted entirely of an argument that the pour pattern was not from bleach, but could have been beer. At no time did [Brian] deny there was a clear and distinct pour pattern, just as Det.Nichols stated. [Brian] simply claims that there could have been an alternate source of the pour pattern."(PCR.L.F.177).

The court further found that Det.Nichols did not testify that it was actually bleach that created the pour marks, but only that he smelled the odor of bleach, which did not require expert testimony, and that he found a bleach bottle in the bathroom sink, and carpeting that appeared to be spotted and discolored(PCR.L.F.177-78). The court said

[21] The court appears to have been referring to the evidentiary hearing.

Nichols did not present a conclusion that the substance was bleach but left that for the jury(PCR.L.F.178). The court also found that whether it was bleach or beer that was poured on Sarah was inconsequential because either was arguably an attempt to hide Brian's conduct, and counsels' strategy of avoiding the issue of rape was reasonable(PCR.L.F.178-79).

Standard of review.

This Court reviews for clear error.***Morrow v. State***,21 S.W.3d 819,822 (Mo.banc2000); Rule29.15(k). Findings are clearly erroneous if, after reviewing the entire record, this Court has the definite and firm impression that a mistake has been made.***State v. Taylor***,929S.W.2d 209(Mo.banc1996). Ineffectiveness claims are reviewed under ***Strickland v.Washington***,466U.S.668,687 (1984);***Williams v.Taylor***,529 U.S. 362,390-91(2000). ***Strickland's*** prejudice prong is satisfied when there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different.*Id*.;***State v. Butler***,951S.W.2d 600,608(Mo.banc1997). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death.***Woodson v. North Carolina***,428U.S. 280,305(1976);***Lankford v. Idaho***,500U.S.110,125(1991).

The Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering, as a mitigating circumstance, any aspect of defendant's character or background that he proffers as a basis for a sentence less than death. ***Lockett v.Ohio***,438 U.S.586,604(1978). Defense counsel "has a duty 'to neutralize

the aggravating circumstances advanced by the state.'"***Ervin v.State***,80 S.W.3d 817,827(Mo.banc2002);***Wiggins v.Smith***,539U.S.510,524(2003). Further, counsel can be ineffective for failing to object to prejudicial evidence,***Kenner v.State***, 709 S.W.2d 536,539(Mo.App.E.D.1986); and argument, ***Copeland v. Washington***, 232 F.3d 969,974-75(8th Cir.2000);***State v.Storey***, 901 S.W.2d 886,901(Mo.banc1995).

Foundation for scientific evidence.

"The long accepted standard for admissibility of results of scientific procedures enunciated in ***Frye v. United States***, requires that such may be admitted only if the procedure is 'sufficiently established to have gained general acceptance in the particular field in which it belongs.'"***State v. Davis***,814 S.W.2d 593,600(Mo. banc1991),*quoting*,***Frye***,293 F.at 1014. "Whether a procedure has gained acceptance in the relevant field and is admissible scientific evidence is established in a ***Frye*** hearing – that is a hearing held outside of the presence of the jury."***State v. Daniels***, 179 S.W.3d 273,281(Mo.App.W.D.2005).

Here, the State sought to introduce evidence that Brian tried to cover up his rape of Sarah by pouring bleach on her. But it presented no evidence that using an alternative light source allows the detection of bleach. In other words, had counsel requested a ***Frye*** hearing, the court would have excluded the evidence because the State provided no foundation. Brian showed in the post-conviction hearing that fluorescence does *not* show the presence of bleach – it simply showed that *something* glowed under the alternative light, not what that "something" was.

That was one fundamental error by the motion court. It apparently believed that Brian was trying to prove that the substance was, or at least could have been beer. That was not the point, or his claim. The claim was that counsel should have requested a ***Frye*** hearing, because had they done so, the State's evidence would not have been admissible, because the State lacked a foundation for its theory that Brian poured bleach on Sarah(PCR.L.F.53-54). Thus, the primary point of offering Prof.Johnson in the post-conviction case was not to prove that beer was used instead of bleach, but simply that there was an alternative, and that because the State provided no foundation for its theory that it was bleach, Nichols's opinions and insinuations were not admissible because they were not proven as accepted in the scientific community.

The motion court's finding that Nichols did not testify that it was actually bleach, but only that he smelled bleach, and that there was a bleach bottle present in the bathroom sink, leaving the conclusion for the jury(PCR.L.F.177-78), is contrary to the record. The prosecutor focused on bleach, and led Nichols to discuss his "bleach investigation" and how he used an alternative light source to bring out what could not otherwise be seen(Tr.676). The State clearly implied that that substance was bleach; it offered no other possibilities. But again, that was a conclusion without a scientific basis, as Brian demonstrated in the post-conviction case.

As for the motion court's finding it was inconsequential whether it was bleach or beer – because either was arguably an attempt to hide his conduct and counsels' strategy of avoiding the issue of rape was reasonable(PCR.L.F.178-79) – that too,

ignores the record. It primarily ignores Slusher's testimony that he had no strategy for failing to contest this issue(Hr.Tr.637). It ignores McBride's testimony that the reports gave no indication whether the substance was something Sarah might have applied herself or when that might have happened (Hr.Tr.742).

The reports also do not say whether it was something – i.e. beer – that Sarah *spilled* on herself(M.Ex.M). When that was pointed out, McBride said that the subject of whether other substances fluoresce could have been investigated(Hr.Tr.742). And the finding most importantly ignores Slusher's testimony that the rape allegation was unquestionably damaging, and if there were some way to effectively fight it, he thought they would have needed to do so(Hr.Tr.657). That is not evidence that even trial counsel thought the "bleach evidence" was inconsequential.

As noted previously, the rape was a significant, if not most significant aggravator. In fact it comprised two of the four aggravators; it was highly important. The evidence also was offered in support of the State's theory that Brian poured bleach to cover up the rape, thus showing his planning and ability to deliberate. But, also contrary to the motion court's finding, the possibility that it was beer rather than bleach did not mean simply that Brian used a different substance to cover up the rape; it meant, based on the beer at the scene that it may well have spilled on Sarah. The smell is not relevant – there was, as said, a bottle of bleach in the adjacent bathroom, and Sarah's sister testified that she helped clean that night to help Sarah prepare for

the holidays(Tr.583). So the smell of bleach does not mean anyone used it to hide a crime.

Finally, trial counsel should have presented the evidence from Prof.Johnson to counter the State's theory that the substance on Sarah was bleach. As stated, and contrary to the motion court's finding, trial counsel both agreed that if they had a way to counter the evidence of rape they would have done so(Hr.Tr.657). This was such a way, and the reason they did not know about it is that they failed to do any investigation whatsoever – Slusher did not recall wondering, knowing of the presence of beer, whether substances other than bleach would fluoresce under an alternate light source(Hr.Tr.614-15), and McBride did not know substances other than bleach would fluoresce under an alternate light source(Hr.Tr.739). Counsel did not live up to their obligation to rebut or mitigate the State's aggravating evidence.***Wiggins***,539U.S.524. Evidence that Brian did not necessarily pour bleach on Sarah rebutted the State's theory and would have mitigated the impact of its evidence.

The State's case concerning the alleged rape began with flawed DNA evidence that it actively hid from defense counsel, was aided by counsel's failure to investigate and the State's failure to disclose additional persons who matched the Y-profile, then culminated in the junk science insinuation of a cover-up that lacked any scientific support. Between this and the failure to present evidence to the contrary, Brian was denied effective counsel and he is entitled to a new sentencing trial.

VI. Failure to request the replacement of Juror Reddick

The motion court clearly erred in denying Brian's claim that counsel were ineffective for failing to move to replace juror Reddick after he disclosed that he knew Ben Bonnie, denying Brian his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S.Const.Amends.VI,VIII, XIV, in that when Reddick disclosed after the presentation of evidence had commenced that he had worked with Ben and supervised him, and had a favorable opinion of him, reasonably competent counsel would have sought to replace Reddick with an alternate who was not biased toward a victim or would have re-questioned Reddick about his feelings after he saw graphic crime-scene and autopsy photographs; had counsel sought Reddick's replacement at either stage, there is a reasonable probability the jury would not have imposed death.

After four witnesses had testified at trial, juror Ryan Reddick, informed the court he had worked closely with Ben Bonnie for six months as his supervisor in a six-person auto shop(Tr.572-74). They did not socialize outside work, and Reddick said the relationship would not make any difference to him(Tr.573-74). He thought Ben "did really good work."(Tr.574). Counsel did not ask to remove Reddick(Tr.575).

The claim and the post-conviction evidence.

Brian alleged that despite Reddick's statements to the contrary when questioned, he could not make a fair and impartial sentencing decision for killing someone he knew, worked with, and apparently thought highly of(PCR.L.F.89). Brian further

alleged that at the point where Reddick disclosed his knowledge and was questioned, he had yet to see photographs from the scene or the autopsy, and there were no follow-up questions after he had seen them(PCR.L.F.89).

When asked at the evidentiary hearing why he did not seek to remove Reddick, Slusher said he "suspect[ed]" that he and McBride had a discussion about it and felt they still wanted Reddick to serve(Hr.Tr.628-29). McBride thought they liked what Reddick had said during voir dire(Hr.Tr.714-15). He did not recall considering that the State would be showing autopsy photographs of Ben(Hr.Tr.715).

The findings.

The motion court found that while they did not remember their specific reasons, trial counsel testified that they discussed removing Reddick, and they were sure there were reasons for their decision to keep him(PCR.L.F.189). The court concluded, "[t]hus, under the law, this remains a matter of sound trial strategy."(PCR.L.F.189).

Standard of review.

This Court reviews for clear error.***Morrow v.State***,21 S.W.3d 819,822(Mo.banc 2000); Rule29.15(k). Findings are clearly erroneous if, after reviewing the entire record, this Court has the definite and firm impression that a mistake has been made. ***State v.Taylor***,929S.W.2d 209(Mo.banc1996). Ineffectiveness claims are reviewed under ***Strickland v.Washington***,466U.S.668,687(1984);***Williams v.Taylor***,529 U.S. 362,390-91(2000). ***Strickland's*** prejudice prong is satisfied when there is a reasonable probability that, but for counsel's ineffectiveness, the result would have

been different.*Id.*;***State v.Butler***,951S.W.2d 600,608(Mo.banc1997). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death.***Woodson v.North Carolina***,428U.S. 280,305(1976); ***Lankford v. Idaho***,500U.S.110,125(1991).

Brian was denied the impartial jury to which he was entitled under the Mo.Const.,Art.I,Sec.18(a). Trial by jury imports a trial by twelve qualified people, "impartial between the parties, ... and sworn to render an impartial verdict according to the law and evidence...."***State v.Ralls***,8S.W.3d64,65(Mo.banc1999)(citation omitted). Reddick was a biased juror who could not render an impartial verdict because he worked with Ben Bonnie and had a high opinion of him(Tr.572-74). That close relationship, however short-lived, made Reddick an inappropriate person to decide whether the killer of a former employee lived or died.

The Sixth and Fourteenth Amendments guarantee a defendant an impartial jury. ***Ristaino v.Ross***,424 U.S.589,595,n.6(1976)(citations omitted). In death penalty cases, "[a]ny veniremember who cannot be impartial is unfit to serve, whether the partiality is due to an aversion to the death penalty, an excessive zeal for death, or any other improper predisposition."***Anderson v.State***,196S.W.3d 28,40(Mo.banc2006) (citation omitted). Counsel's ineffectiveness in failing to strike a juror for an improper predisposition is structural error.*Id.*;***Gray v.Mississippi***,481 U.S.648,668 (1987);***Knese v.State***,85 S.W.3d 628,632-33(Mo.banc2002)(failure to review questionnaires resulting in biased panelists serving on jury). "A death sentence imposed by a jury tainted with structural error must be vacated.***Anderson***, citing

Gray,481 U.S.660.

Although this Court will uphold rulings on cause challenges unless clearly against the evidence and a clear abuse of discretion,***State v.Christeson***,50S.W.3d251,264 (Mo.banc2001), structural errors in the constitution of the trial mechanism "require[e] automatic reversal of the conviction because they infect the entire trial process." ***Brecht v.Abrahamson***,507U.S.619,629-30(1993). A trial in which structural error has occurred "cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." ***Arizona v.Fulminante***,499U.S.279,310(1991).

In ***Anderson***, the failure to strike an automatic death penalty and burden shifting juror denied the defendant effective assistance of counsel without his having to show prejudice because the error was structural.196 S.W.3d 39-42.

In Brian's case, counsel's inaction in the face of learning mid-trial that a juror would be involved who worked closely with a victim created a structural error by denying Brian an impartial jury. But the motion court's judgment once again has little in common with the record. Its ruling that trial counsel testified that they discussed removing Reddick, and they were sure there were reasons for their decision to keep him; they just did not remember specific reasons(PCR.L.F.189), is at odds with Slusher's testimony that he could only say what typically happens in those situations – he simply guessed that he and McBride had a discussion about it and felt they still wanted Reddick to serve; he did not say he *had* a reason(Hr.Tr.628-29).

And McBride also testified only that he thought they liked what Reddick had said during voir dire(Hr.Tr.715). That is not the same as having reasons to keep him. Again, counsel was speculating. Further, McBride did not recall considering the fact that the State would be showing the jury autopsy photographs of Ben(Hr.Tr.715). Therefore, counsel took no steps to make sure that they had an impartial juror, and jury, where the jury member had to look at pictures of his murdered former employee, both at the scene and in the course of autopsy, then decide whether the admitted killer lived or died.

Even if counsels' guesses can be regarded as an actual reason – whatever it was – it was not reasonable to leave on a juror who knew, worked closely with a victim, and held him in high regard. It is important that Brian also alleged that counsel was also ineffective for failing to follow up with Reddick after viewing crime-scene and autopsy photographs(PCR.L.F.89). This belies any thought that counsel might have had a reasonable trial strategy for not seeking to remove Reddick – they did not ensure his impartiality based on all relevant factors. It is one thing for Reddick to see a photograph of Ben in life and say he could still be fair(Tr. 572-74). It is quite another to see him after being murdered with a shotgun and believe he would still have an open mind about the fate of his killer.

"There was here a denial of the right to trial by jury. This fits the ***Strickland*** language ... that 'prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost.'"***Presley v.State***,750 S.W.2d 602,604-

06(Mo.App.S.D.1988)(motion court judgment finding ineffective assistance affirmed where counsel failed to strike juror who admitted bias during voir dire).

The foregoing leads to the firm impression that the motion court's conclusion, "[t]hus, under the law, this remains a matter of sound trial strategy"(PCR.L.F.189), is both divorced from the record and a leap in logic. Counsel professed no trial strategy beyond guessing that they must have had one, and it is entirely illogical that the absence of any strategy can be sound. Even if they had a strategy at the time of Reddick's revelation, counsel failed to follow up after he saw gruesome photographs of his former coworker. For these reasons, Brian is entitled to a new sentencing trial before an impartial jury.

VII. Conflict of interest: Flat Fee

The motion court clearly erred in denying Brian's claim that counsel had a conflict of interest caused by their being limited to a flat fee to represent Brian, denying Brian his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends.VI,VIII,XIV, in that counsel were paid $12,000 each for a death penalty defense, regardless of whether the case resulted in a plea, a full trial of guilt and sentence, or a plea with a sentence-only trial such as occurred. This provided an incentive for counsel to do as little work as possible, creating a "divergence of interests" between Brian and counsel that impacted everything from Brian's decision to plead guilty to how the case was investigated, to what evidence was presented on Brian's behalf. Had counsel not had an actual conflict of interest, Brian would not have pleaded guilty and the jury would not have imposed death.

Co-counsel Slusher and McBride were retained by the Public Defender System to represent Brian, and were paid a flat fee of $12,000 each; no part would have to be refunded if the case were resolved without trial(Hr.Tr.547-48). The Public Defender would also pay reasonable, approved expenses(Hr.Tr.548-49). Both counsel denied that the flat fee arrangement influenced what or how much investigation they did, or steps they wanted to take in representing Brian(Hr.Tr.639-40,724).

Rollin Thompson, who worked for Slusher's law firm as an investigator, testified that he was limited to contacting four mitigation witnesses by telephone, rather than

seeing them in person(Hr.Tr.558-62). Thompson normally does witness interviews in person if at all possible(Hr.Tr.561-62). He probably received an email from Slusher telling him to make the contacts by phone(Hr.Tr.562). Thompson did no work on the guilt phase of the case, nor was he asked to investigate the issues of rape or the use of bleach(Hr.Tr.562). Slusher testified that Thompson originally was not to have a role, because he could not afford to pay Thompson to work on the case for the fee Slusher was to get(Hr.Tr.574). He thought the use of Thompson came about because he was convenient as an employee, whereas he would have to put in a funding request for an outside investigator(Hr.Tr.571). Slusher did not have a mitigation expert work on the case; a paralegal in his office assisted him, but it was her first time working on mitigation for him, and she had not been to any capital investigation training at a national school or conference(Hr.Tr.573).

The motion court found credible counsels' desire to provide an effective defense (PCR.L.F.194). It did not believe any decision was motivated by a desire to minimize their time or expenses(PCR.L.F.194). The court further found that Thompson did not testify that any limitation on his work was for financial reasons(PCR.L.F. 194). The court concluded that the fee arrangement did not impact counsels' effective representation, and did not influence their decisions(PCR.L.F.194). It also said both attorneys knew additional funds were available for experts, etc., if they felt them necessary, and that counsel had sought and received funds for a DNA expert, but simply made a strategic decision to not challenge that evidence(PCR.L.F.194).

Standard of review.

This Court reviews for clear error.***Morrow v. State***,21 S.W.3d 819,822 (Mo.banc2000); Rule29.15(k). Findings are clearly erroneous if, after reviewing the entire record, this Court has the definite and firm impression that a mistake has been made.***State v. Taylor***,929S.W.2d 209(Mo.banc1996). Ineffectiveness claims are reviewed under ***Strickland v. Washington***,466U.S.668,687 (1984);***Williams v. Taylor***,529 U.S. 362,390-91(2000). ***Strickland's*** prejudice prong is satisfied when there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different.*Id*.;***State v. Butler***,951S.W.2d 600,608(Mo.banc1997). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death.***Woodson v. North Carolina***,428U.S.280,305 (1976); ***Lankford v. Idaho***,500U.S.110,125(1991).

The Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering, as a mitigating circumstance, any aspect of defendant's character or background that he proffers as a basis for a sentence less than death. ***Lockett v.Ohio***,438 U.S.586,604(1978). Defense counsel in a death penalty case is obligated to discover and present all substantial, available mitigating evidence. ***Wiggins v. Taylor***,539U.S.510,524(2003);***Kenley v. Armontrout***,937F.2d1298, 1307-09(8thCir.1991).

Counsel labored under an actual conflict of interest.

To prevail on a claim of ineffective assistance of counsel based on a conflict of

interest, Brian must show that an actual conflict of interest adversely affected his counsels' performance.***State v. Roll***, 942 S.W.2d 370,377(Mo.banc1997);*see also* ***Cuyler v. Sullivan***,446 U.S.335,348(1980).

An exception to ***Strickland's*** general rule that a defendant alleging a Sixth Amendment violation must show a reasonable probability of a different result absent counsel's errors is "where assistance of counsel has been denied entirely or during a critical stage of the proceeding."***Mickens v.Taylor***,535 U.S.162,166(2001). In such a case, "the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary."*Id.* "[C]ircumstances of that magnitude" include when counsel "actively represented conflicting interests."*Id.* In Brian's case, the diverging interests are not multiple defendants but the interests of counsel in completing their representation of Brian in as little time, and with as few expenses as possible.

"[A] financial conflict of interest may arise when a defendant's inability to pay creates a 'divergence of interests' between the defendant and counsel such that counsel pressures or coerces the defendant to plead guilty where, absent the coercion, the defendant would have taken the case to trial."***Conger v. State***,356 S.W.3d 217, 221-22(Mo.App.E.D.2011). Although here, Brian was not told that he had to pay additional fees to go to trial, the effect was the same: counsels' interest in Brian's pleading guilty rather than going to trial, then minimizing their mitigation investigation was also a divergence of interests between Brian and his counsel. Counsel each received $12,000 whether they went to trial or not, whether they spent hours investigating the State's allegation of rape or not, whether they consulted with a

psychiatrist, or Brian's treating physicians, or simply relied on Dr.Smith to recite what he had read in Brian's records. Counsel had every incentive to minimize their work on Brian's behalf in order to maximize their hourly return for that work.

The fact that the motion court found counsel credible does not change the analysis. Counsel could quite honestly have *believed* they did not do anything differently had they been receiving an hourly fee. But that is contrary to the knowledge of human nature, as well as inconsistent with the record that shows that counsel did not investigate the State's DNA evidence, or the fact that there were "hits" on other men with the same Y-profile, or the issue whether Brian poured bleach on Sarah. And they did not consult with a psychiatrist or Brian's treating physicians to present mitigating evidence. "In order to prove a conflict of interest, something must have been done by counsel or something must have been forgone by counsel and lost to defendant, which was detrimental to the interests of defendant and advantageous to another."***Conger v. State***,356 S.W.3d 221. The foregoing list of what counsel did not do meets this test and satisfies Brian's burden.

Brian was represented by counsel whose financial self-interest could not help but overwhelm any sincere desire they may have had to provide competent, effective representation. This was an actual conflict of interest, from which prejudice is presumed.***Mickens v Taylor***. This Court must vacate Brian's pleas and remand for further proceedings in the criminal cause.

CONCLUSION

For the reasons stated in Points I, III, and VII, Brian Dorsey asks this Court to reverse and remand for a trial on guilt, or in the alternative, a new penalty trial. For the reasons stated in Points II, IV, V, and VI, Brian asks the Court to remand for a new penalty trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Kent Denzel, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, the brief contains 29,820 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On the 11th day of September, 2013, the foregoing brief was filed through the E-file system for delivery to Shaun J Mackelprang, Assistant Attorney General. The electronic file has been scanned for viruses using Symantec Endpoint Protection, updated in September, 2013, and according to that program, the file is virus-free.

/s/ *Kent Denzel*
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